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No. 01-___

In The

Supreme Court of the United States

ULLICO INC., MRCO, INC., THE UNION LABOR LIFE INSURANCE COMPANY, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, and BEVERLY MIRTLE,

Petitioners,

v.

CORINNE E. BLACK,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Preemption Clause of the Alternative Mortgage Transaction Parity Act provides:

> (c) Preemption of State constitutions, laws or regulations
>
> An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation.

12 U.S.C. § 3803(c). The question presented is:

Whether the California Court of Appeal violated the Preemption Clause by allowing state law claims attacking an alternative mortgage transaction made in full compliance with the Parity Act by a state-chartered housing creditor?

PARTIES

Petitioners:

ULLICO Inc., MRCo, Inc., The Union Labor Life Insurance Company, Financial Freedom Senior Funding Corporation, and Beverly Mirtle

Respondent:

Corinne E. Black and James R. Mahoney

RULE 29.6 STATEMENT

The Petitioners are ULLICO Inc. ("ULLICO"), MRCo, Inc. ("MRCo"), The Union Labor Life Insurance Company ("Union Labor Life"), Financial Freedom Senior Funding Corporation ("Financial Freedom"), and Beverly Mirtle. MRCo and Union Labor Life are wholly-owned subsidiaries of ULLICO. There is no parent or publicly held company owning 10% or more of ULLICO's stock. Financial Freedom is a majority-owned subsidiary of Lehman Brothers Bank, FSB, and an indirect subsidiary of Lehman Brothers Holdings, Inc. No person or entity owns 10% or more of Lehman Brothers Holdings, Inc.'s stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

The Underlying Transaction 4

The Parity Act 5

Proceedings Below 9

REASONS FOR GRANTING THE PETITION 10

I. THE PREEMPTION CLAUSE OF THE PARITY ACT MANDATES DISMISSAL OF RESPONDENT'S STATE LAW CLAIMS 11

II. THE CALIFORNIA COURT OF APPEAL MISINTERPRETED THE PREEMPTION CLAUSE SO AS TO THWART THE PURPOSE OF THE PARITY ACT 17

III. THE CALIFORNIA COURT OF APPEAL'S INTERPRETATION OF THE PREEMPTION CLAUSE IS DIRECTLY CONTRARY TO EVERY FEDERAL COURT DECISION THAT HAS ADDRESSED THE PREEMPTION ISSUE 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Acosta v. Master Maintenance & Constr., Inc., 52 F. Supp. 2d 699 (M.D. La.1999) 29

Ardestani v. I.N.S., 502 U.S. 129 (1991)..... 18

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996) 12

Belknap, Inc. v. Hale, 463 U.S. 491 (1983)..... 1

Beverly Hills Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., 371 F. Supp. 306 (1973) 24, 25

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)..... 21

Christensen v. Harris County, 529 U.S. 576 (2000)..... 21

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 16

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2

Crooks v. Harrelson, 282 U.S. 55 (1930)..... 19

De la Cuesta v. Fidelity Fed. Sav. & Loan Ass'n, 121 Cal. App. 3d 328, 175 Cal. Rptr. 467 (1981), *rev'd*, 458 U.S. 141 (1982) 26

F.E.C. v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981) 22, 23

Federal Sav. & Loan Ins. Corp. v. Kidwell, 716 F. Supp. 1315 (N.D. Cal. 1989), *vacated on other grounds sub nom. Eureka Fed. and Sav. Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991)..... 7

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) ..... *passim*

First Gibraltar Bank, FSB v. Morales, 19 F.3d 1032 (5th Cir. 1994), *vacated on other grounds*, 42 F.3d 895 (5th Cir. 1995)..... 29

TABLE OF AUTHORITIES – Continued

Page

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 12, 16

Fort Wayne Books v. Indiana, 489 U.S. 46 (1989) 2

Grunbeck v. Dime Sav. Bank of New York, 74 F.3d 331 (1996) 21

Hines v. Davidowitz, 312 U.S. 52 (1941) 12, 16, 19

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 12

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 13

National Home Equity Mortgage Ass'n v. Face, 239 F.3d 633 (4th Cir.), *cert. denied*, ___ U.S. ___, 122 S. Ct. 58 (2001) ..... *passim*

National Home Equity Mortgage Ass'n v. Face, 64 F. Supp. 2d 584 (E.D. Va. 1999) 9

O'Connor v. Donaldson, 422 U.S. 563 (1975) 29

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 12

Panko v. Pan American Fed. Sav. & Loan Ass'n, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981) 26

Reich v. Webb, 336 F.2d 153 (9th Cir. 1964) 24

Reno v. Koray, 515 U.S. 50 (1995) 21, 23

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 12

Shinn v. Encore Mortgage Serv., 96 F. Supp. 2d 419 (D.N.J. 2000) 8, 13, 28, 29, 30

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 21

TABLE OF AUTHORITIES – Continued

Page

United States Dept. of Health & Human Serv. v. FLRA, 983 F.2d 578 (4th Cir. 1992) 29

Washington Mutual Bank, FA v. Superior Court, 95 Cal. App. 4th 606, 115 Cal. Rptr. 2d 765 (2002) 7

CONSTITUTION:

United States Constitution, Article VI, Clause 2 3

STATUTES AND REGULATIONS:

12 U.S.C. § 484 19

12 U.S.C. § 1461 6

12 U.S.C. §§ 1462a-1464 6

12 U.S.C. § 1464(a)(1) 24

12 U.S.C. § 1831x(g)(2)(B) 19

12 U.S.C. § 3801 27

12 U.S.C. § 3801(a)(1) 5

12 U.S.C. § 3801(a)(3) 7

12 U.S.C. § 3801(b) 6, 7, 13

12 U.S.C. § 3802(1) 5

12 U.S.C. § 3803(a) 7, 14

12 U.S.C. § 3803(c) ..... *passim*

12 U.S.C. § 3804 9

15 U.S.C. §§ 1601 *et seq.* 23

28 U.S.C. § 1257 1

TABLE OF AUTHORITIES – Continued

Page

Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982) ...5, 27

12 C.F.R. Pt. 226 23

12 C.F.R. Pt. 226, App. K 23

12 C.F.R. § 545.33 27

12 C.F.R. § 545.33(f) 29

12 C.F.R. § 560.2 11

12 C.F.R. § 560.210 .....20, 25

12 C.F.R. § 560.220 ..... *passim*

12 C.F.R. § 560.33 .....20, 25

12 C.F.R. § 560.34 .....20, 25, 27

12 C.F.R. § 560.35 .....20, 25

24 C.F.R. § 3500.21(h) 19

43 Fed. Reg. 49,336 (1978) 6

44 Fed. Reg. 32,199 (1979) 6

MISCELLANEOUS:

S. CONF. REP. NO. 97-641 (1982) 7

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that the Court grant a writ of certiorari to review the opinion of the First District Court of Appeal of the State of California.

OPINION BELOW

The opinion of the Court of Appeal (Appendix A) is reported at 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445 (2001). The order (Appendix B) and judgment of the trial court (Appendix C), which the Court of Appeal reversed, is not reported. The order of the California Supreme Court denying review (Appendix D) is not reported.

JURISDICTION

The California Court of Appeal issued its opinion on October 5, 2001. The California Supreme Court denied review on January 3, 2002. The California Court of Appeal's determination that Respondent Corinne E. Black's state law claims are not preempted by the Alternative Mortgage Transaction Parity Act (12 U.S.C. §§ 3801 *et seq.*) is final within the meaning of 28 U.S.C. § 1257 because it finally disposed of the federal preemption issue. *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n. 5 (1983) (Kentucky court of appeal's interlocutory decision that state causes of action were not preempted by NLRA was final within the meaning of 28 U.S.C. § 1257). If the writ is denied, Petitioners may ultimately prevail in the state court on non-federal grounds, precluding review of this

substantial federal question, and the important federal policy that there be parity between state and federally chartered lenders in the alternative mortgage market would be undermined.[1] If review of the preemption issue is granted now, a reversal of the decision below would dispose of this litigation. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975); *Fort Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989); *Belknap*, 463 U.S. at 497.

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[1] Guidance from this Court is needed at this time because numerous state law challenges to the alternative mortgages offered by Petitioners and their predecessors have been filed in California State Courts. *DeLuca v. Transamerica HomeFirst, Inc.*, Superior Court of California, County of San Francisco, Case No. 400008; *Ebersole v. Transamerica HomeFirst, Inc.*, Superior Court of California, County of Santa Barbara, Case No. 01045770; *Flores v. Transamerica HomeFirst, Inc.*, Superior Court of California, County of San Francisco, Case No. 310594; *Ford v. Freedom Investment Fund, Inc.*, Superior Court of California, County of San Mateo, Case No. 413137 (class action); *Gentle v. Freedom Investment Fund, Inc.*, Superior Court California, County of Santa Clara, Case No. CV 790194 (class action); *Head v. Transamerica Corporation*, Superior Court of California, County of San Francisco, Case No. 997850 (class action); *San Mateo County Public Guardian v. Transamerica HomeFirst, Inc.*, Superior Court of California, County of San Mateo, Case No. 405495 (class action); *Walker v. Transamerica Corporation*, Superior Court of California, County of San Mateo, Case No. 406465 (class action). Petitioner Financial Freedom is the successor by merger to Transamerica HomeFirst, Inc., which was the lender in the *DeLuca, Ebersole, Head, Public Guardian* and *Walker* cases. Petitioners Financial Freedom, ULLICO, MRCo, and Union Labor Life are defendants in the *Ford* and *Gentle* cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, Clause 2, states in pertinent part:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land. . . . "

The Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. § 3803(c)) states:

> (c) Preemption of state constitutions, laws & regulations
>
> An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation.

STATEMENT

Reverse and shared appreciation mortgages enable senior citizens to raise needed cash by pledging the equity of their homes, while permitting their continued occupancy without any interim repayments. The lender of a reverse mortgage disburses the loan proceeds to or for the borrower, and the loan is secured by a deed of trust on the property. Some or all of the loan proceeds may be placed in an annuity which guarantees a stream of monthly income payments for the borrower's lifetime, even after the loan has matured and been repaid. The loan matures upon the death of the borrower or when the borrower sells or vacates the property. A shared appreciation reverse mortgage operates the same way as any

other reverse mortgage, except that the borrower agrees to repay the loan plus a percentage of any appreciation of the property. This shared appreciation feature increases the amount of money available to the borrower at the outset of the loan.

The Underlying Transaction

Respondent Corinne E. Black ("Respondent"), and her late husband, Charles T. Black, were senior citizen homeowners. On March 28, 1994, Respondent and her late husband entered into a shared appreciation reverse mortgage with Freedom Investment Fund, Inc. The loan was based on their home's 1994 appraised value of $1,060,000.00. The reverse mortgage converted 70.75% of the appraised value to cash, which discounted at 3.75% per year for the Blacks' joint life expectancy, resulted in a loan principal of $305,455. At maturity, the Blacks were obligated to pay a 7% maturity fee plus 70.75% of 93% of the then current value of the property. Thus, the effective interest rate would depend on the rate of appreciation of the home and the Blacks' actual life span. Part of the proceeds was deposited in an annuity issued by Union Labor Life. The annuity paid immediate and continuing benefits for the life of either borrower. The mortgage has not been satisfied; no repayment is required as long as either borrower occupies the home.

The loan documents and multiple disclosures received by the Blacks prior to closing provided full disclosure of all material aspects of the transaction. In addition, the Blacks acknowledged in writing they consulted their attorney and their accountant regarding the

terms of the reverse mortgage prior to entering into the transaction.

The Parity Act

In the late 1970s and early 1980s, the United States experienced an "alarming deterioration" in its home mortgage lending markets. *See National Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633, 635 (4th Cir.), *cert. denied*, ___ U.S. ___, 122 S. Ct. 58 (2001). In enacting the Garn-St. Germain Depository Institutions Act of 1982, Congress found that this crisis was due to "increasingly volatile and dynamic changes in interest rates [that had] seriously impaired the ability of housing creditors to provide consumers with fixed-term, fixed-rate credit secured by interests in real property." 12 U.S.C. § 3801(a)(1). Congress passed Garn-St. Germain "to revitalize the housing industry by strengthening the financial stability of home mortgage lending institutions and ensuring the availability of home mortgage loans." Pub. L. No. 97-320, 96 Stat. 1469 (1982).

The Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act")[2] was Title VIII of Garn-St. Germain. Alternative mortgage transactions generally include anything other than conventional fixed term, fixed rate mortgage loans. 12 U.S.C. § 3802(1). Congress enacted the Parity Act to enable state-chartered lenders to compete on an equal footing with federally chartered lenders in

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[2] 12 U.S.C. §§ 3801 *et seq.*

the alternative mortgage markets.[3] 12 U.S.C. § 3801(b). Congress' stated goal was to establish "parity" – a "level playing field" – between federally chartered and state-chartered market participants. *Id.*

Prior to the Parity Act, federally chartered home mortgage lenders enjoyed a competitive advantage over their state-chartered rivals because federally chartered lenders were governed by uniform federal regulations under the Home Owners' Loan Act (12 U.S.C. §§ 1461 *et seq.*) ("HOLA"), while state-chartered lenders were subject to fifty different sets of state laws. HOLA established the Federal Home Loan Bank Board (the "Board"), replaced in 1989 by the Office of Thrift Supervision ("OTS"),[4] and vested it with plenary authority to implement and administer HOLA.[5] 12 U.S.C. §§ 1462a-1464. Since this Court's decision in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), it has been settled that HOLA and the regulations promulgated

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[3] Four years earlier, in 1978, the Federal Home Loan Bank Board had authorized federal savings associations to use three new "alternative" mortgage instruments: the variable rate mortgage, the graduated payment mortgage, and the reverse annuity mortgage. 43 Fed. Reg. 49,336 (1978); 44 Fed. Reg. 32,199 (1979).

[4] This occurred in 1989 when Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act. 12 U.S.C. §§ 1462a-1464.

[5] Section 5(a) of the HOLA empowers the Board, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations.' " *De la Cuesta*, 458 U.S. at 161 (citing 12 U.S.C. § 1464(a) (1976 ed., Supp. IV)).

thereunder by the Board, and later by the OTS, preempt state regulation of the operations of federally chartered mortgage lenders, and insulate them against state law claims concerning their lending practices. *Id.* at 159-167; *Federal Sav. & Loan Ins. Corp. v. Kidwell*, 716 F. Supp. 1315, 1317 (N.D. Cal. 1989) (state law claims for negligence and waste preempted), *vacated on other grounds sub nom. Eureka Fed. and Sav. Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991); *Washington Mutual Bank, FA v. Superior Court*, 95 Cal. App. 4th 606, 621, 115 Cal. Rptr. 2d 765, 776 (2002) (state law claims preempted under HOLA and regulations thereunder).

In the Parity Act, Congress ended the differential regulatory treatment which placed state-chartered lenders at a disadvantage in competing with federally chartered lenders for alternative mortgages. Congress declared that the Parity Act would henceforth "prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making, purchasing and enforcing alternative mortgage transactions." 12 U.S.C. § 3803(a). By "authoriz[ing] non-federally chartered housing creditors to offer alternative mortgages in accordance with the Federal regulations issued by the appropriate Federal regulatory agencies" (12 U.S.C. §§ 3801(a)(3), 3801(b)), Congress sought to "eliminate the discriminatory impact" of a scheme where federally chartered lenders were required to comply with only one set of laws to do business in all fifty states, whereas state-regulated lenders must comply with the disparate laws of each state in which they sought to do business. S. CONF. REP. NO. 97-641, at 94 (1982). "Thus, those creditors will have parity with federally chartered institutions." *Id.*; *see also*

Shinn v. Encore Mortgage Services, Inc., 96 F. Supp. 2d 419, 422 (D.N.J. 2000) ("The Parity Act was passed to level the playing field.").

The "practical effect" of the Parity Act was "to permit a non-federally chartered housing creditor to make a loan either under state law, in which case the loan transaction remains subject to the full range of state regulations, or under federal law, in which case the loan transaction becomes subject to federal regulations governing similar loans by federally chartered lending institutions." *Face*, 239 F.3d at 635-636. A state-chartered lender could thus choose to issue its loans under the existing state law framework, or it could opt to have its loans governed instead by federal law "by affirmatively complying with substantive federal regulations identified by [the Office of Thrift Supervision]." *Id.* at 636. "In return for exercising this option, the non-federally chartered housing creditor [was] promised parity with federally chartered lenders." *Id.* (citing 12 U.S.C. § 3803). In particular, the Parity Act states:

> (c) Preemption of State constitutions, laws or regulations
>
> An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation.

12 U.S.C. § 3803(c). Respondent's lenders elected to comply with, and be governed by, federal law.

Congress did not force the states to accept the Parity Act. Congress afforded each state the opportunity to opt out of federal preemption by enacting or adopting legislation

that the state "does not want the preemption provided in [12 U.S.C. § 3803(c)] to apply with respect to alternative mortgage transactions (or to any class or type of alternative mortgage transaction) subject to the laws of such State." 12 U.S.C. § 3804. "Simply stated, Congress gave the states a choice – the states could choose to be regulated by the federal regime under the Parity Act, or the states could choose to opt out of the preemption provision of the Parity Act and continue the state's own regime." *National Home Equity Mortgage Ass'n v. Face*, 64 F. Supp. 2d 584, 588 (E.D. Va. 1999).

California chose not to opt out. As a result, California's state-chartered housing lenders were given the option to make, purchase, and enforce their alternative mortgage transactions either pursuant to state law and regulations or pursuant to federal regulations designated for that purpose. In the latter case, the loans could be made "notwithstanding any State constitution, law, or regulation." 12 U.S.C. § 3803(c).

Proceedings Below

The late Charles T. Black and Respondent Corinne E. Black, as Trustees of the Charles T. Black and Corinne E. Black Trust, filed a class action against Petitioners and Respondent James R. Mahoney asserting state law claims that the reverse mortgages, which are in full compliance with the Parity Act and the relevant Office of Thrift Supervision regulations, are "misleading and unconscionable agreements" (Complaint ¶¶ 40-45), with terms that charge "unconscionable 'interest' charges" in "misleading loan documents" (Complaint ¶¶ 46-61), and levy "unfair

'loan origination fees' " and "unfair 'large cash advance fees' " (Complaint ¶¶ 62-73). These allegations, styled as causes of action for elder abuse, violation of Unfair Business Practices Act, violation of Consumer Legal Remedies Act, breach of fiduciary duty, fraud – concealment, and fraud – negligent misrepresentation, are state law claims that would render unlawful a transaction that would not be subject to such a suit if executed by a federally chartered alternative mortgage lender.

After discovery, Petitioners and Respondent James R. Mahoney moved for summary judgment on the grounds that all of Respondent's state law claims are preempted by the Parity Act. The trial court granted the motion, *dismissing all of the claims*, and ruling that "the subject matter of this action [is] preempted by Federal Law." Appendix B and C. The California Court of Appeal reversed, holding that the Parity Act *preempted none of the Blacks' state law claims*. Appendix A. The California Supreme Court denied a petition for discretionary review. Appendix D.

REASONS FOR GRANTING THE PETITION

As this Court explained in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), pursuant to HOLA, the Board – now the OTS – has promulgated regulations governing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *Id.* at 145. Indeed, the OTS has declared that:

> To enhance safety and soundness and to enable federal savings associations to conduct their

> operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations.

12 C.F.R. § 560.2. Thus, state lending regulation of federal savings associations is preempted by the OTS. *Id.*

The Parity Act was designed to place state-chartered alternative mortgage lenders on equal footing with federal savings associations. But the state court has denied the Petitioners parity with federal alternative mortgage lenders by holding that state law challenges to the reverse mortgage transactions are not preempted. The rationale of the decision is directly contrary to the decisions of other courts that have addressed the scope of preemption under the Parity Act. Moreover, numerous actions similarly asserting state law challenges to alternative mortgages are currently pending against Petitioners and other state-chartered alternative mortgage lenders. (*See* footnote 1 *supra*.) This Court should act now to prevent further erosion of the scope of preemption of state law claims against alternative mortgage lenders.

I. THE PREEMPTION CLAUSE OF THE PARITY ACT MANDATES DISMISSAL OF RESPONDENT'S STATE LAW CLAIMS

This Court has explained that preemption may be either express or implied; preemption " 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *De la Cuesta*, 458 U.S. at 152-153 (quoting

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). Express preemption occurs when Congress displaces state law "by so stating in express terms." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983). Implied preemption occurs when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," when "the Act of Congress [touches] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or when "the object sought to be obtained by the federal law and the character of obligations imposed by it [reveals] the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also de la Cuesta*, 458 U.S. at 153.

Even where Congress has not occupied the field, however, state law is nevertheless preempted when it actually conflicts with federal law (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-143 (1963)), or when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The starting point of any preemption analysis is to ascertain Congress' intent: "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996). The best evidence of the intent of Congress is the language of the statute. "[W]e [ ] begin with the language employed by Congress and the

assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (internal quotations and citations omitted).

Congress expressly stated its purpose in section 802(b) of Garn-St. Germain (12 U.S.C. § 3801(b)):

> It is the purpose of this chapter to eliminate the discriminatory impact that those [federal] regulations [authorizing federal lenders to make alternative mortgages] have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies.

Under section 802(b), Congress did not, as the Court of Appeal concluded, merely authorize state housing creditors to make alternative mortgages; rather, Congress sought to subject "all" housing creditors to uniform federal regulations. Congress expressly sought "to eliminate the discriminatory impact" on state-chartered lenders who were subject to fifty different sets of laws if they sought to do business nationwide, compared to federal lenders who were subject to uniform federal regulations nationwide by "authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies," Congress demonstrated its intent to preempt not only state laws that prohibit alternative mortgage transactions, but also those that impede them. *See Shinn*, 96 F. Supp. 2d at

423-424 (rejecting the argument that the Parity Act was meant to preempt only those state laws which prohibit alternative mortgages).

Furthermore, nothing in the Congressional statement of purpose suggests any intention merely to supplement state regulation. Section 804(a) of Garn-St. Germain (12 U.S.C. § 3803(a)), provides that:

> In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making, purchasing, and enforcing alternative mortgage transactions, housing creditors may make, purchase, and enforce alternative mortgage transactions, except that this section shall apply –
>
> * * *
>
> (3) with respect to all other housing creditors, including without limitation, savings and loan associations, mutual savings banks, and savings banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section.

Thus, these provisions reiterate that the purpose of the Parity Act is "to prevent discrimination against State-chartered depository institutions, and other nonfederally

chartered housing creditors." *Id.* In order to prevent discrimination, the same regulations which apply to federally chartered savings and loan associations should apply to state-chartered housing creditors. *Id.*

Section 804(c) of Garn-St. Germain (12 U.S.C. § 3803(c)) leaves no doubt that state law is preempted as to any qualifying transaction:

> (c) Preemption of State constitutions, laws or regulations
>
> An alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation.

The use of the word "any" evinces an intention to preempt state law completely. The broad language utilized by Congress does not qualify or limit the breadth of preemption only to conflicting constitutions, laws or regulations. There is simply no ambiguity in the terms of the statute: a transaction may be made in accordance with section 804, "notwithstanding any State constitution, law, or regulation."

Time-honored principles of statutory interpretation dictate that the unequivocal meaning of section 804(c) should have been enforced by the California courts. As this Court has explained:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute

> are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

Moreover, it is well-settled that "all parts of a statute, if possible, are to be given effect." *De la Cuesta*, 458 U.S. at 163. Under the Supremacy Clause, conflict preemption applies without any express congressional enactment. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal [regulations and state tort law] is a physical impossibility . . . "). Thus, interpreting section 804(c) as adopting only conflict preemption renders the section superfluous and unnecessary. Such an interpretation should be rejected, especially given the plain language of the statute itself. *See de la Cuesta*, 458 U.S. at 163 (counseling against an interpretation of HOLA which would render certain provisions nugatory).

It is also apparent that imposing a dual regime of state and federal law would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. As explained above, the congressional purpose behind the Parity Act was to invite state-chartered lenders into the alternative mortgage markets by guaranteeing them a "level playing field" with federally chartered lenders already operating in those markets. By eliminating the Act's preemption protections for state-chartered lenders and resurrecting the full panoply of state law claims that

may be asserted against them, the California Court of Appeal defeated that purpose.

II. THE CALIFORNIA COURT OF APPEAL MISINTERPRETED THE PREEMPTION CLAUSE SO AS TO THWART THE PURPOSE OF THE PARITY ACT

In order to conclude that the Parity Act preempts state laws only to the extent it conflicts with the regulations designated by the OTS, the California Court of Appeal labored to find an ambiguity in the clear language in 12 U.S.C. § 3803(c), reasoning that the words "notwithstanding any State constitution, law or regulation" are susceptible to two interpretations. Appendix A, at App. 17. The first interpretation – the correct one – is that the Parity Act was intended to preempt all state law. The second interpretation is that:

> the phrase "any state constitution, law or regulation" can be interpreted as implicitly limited to those [state laws and regulations] that prohibit or impede alternative mortgage transactions or that *conflict* with federal regulations deemed applicable to non-federally chartered housing creditors.

Appendix A, at App. 17 (emphasis in original).

However, there is no textual support in the language of section 3803(c) for the "implicit" limitation imposed by the Court of Appeal. Indeed, the Court of Appeal recognized that Congress' use of the term "any" to modify the phrase "state constitution, law or regulation" expresses the intention that all such laws would be preempted. The

Court of Appeal never explained why it chose to disregard the words Congress used so far as to create an "implicit" limitation not found in these statutes. The appellate court found that an implicit adoption of conflict preemption "would leave broad room for state regulation because there are only four federal regulations with which the transactions of housing creditors must comply." Appendix A, at App. 17. This interpretation would defeat the intention of Congress to level the playing field between state and federal lenders. Since the OTS has not adopted a reverse mortgage regulation applicable to either state or federal lenders, this crabbed interpretation of the Preemption Clause would grant a free hand to California to regulate reverse mortgages made by state-chartered housing creditors, while federal lenders could make the same loans without similar restrictions.

The Court of Appeal relied on the last paragraph of section 3802, which disqualifies a housing creditor from Parity Act protection unless it holds any state license otherwise necessary for the transaction and is subject to "applicable regulatory requirements and enforcement mechanisms provided by State law." This, the Court said, indicated that Congress intended conflict preemption only.

The Court of Appeal overlooked "[t]he 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.*, 502 U.S. 129, 135-136 (1991) (citation omitted). This conclusion is especially unwarranted in the face of the express and broad preemption of section 3803(c) and the absence of any

statement, such as Congress has used before, preserving non-conflicting state laws. *See* 12 U.S.C. § 484 (preserving state unclaimed property and escheat laws); 12 U.S.C. § 1831x(g)(2)(B) (laws providing greater consumer protection not preempted); 24 C.F.R. § 3500.21(h) (specified state laws not preempted).

A sounder conclusion is that Congress intended to require state housing creditors to have licenses and meet applicable licensing standards, but not to permit states, via the licensing power, to re-regulate alternative mortgage lending and thwart the intentions of Congress. This would be impermissible because the licensing scheme would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines*, 312 U.S. at 67.

This Court has often repeated that courts should refrain from looking beyond the literal meaning of the statute, unless "a literal interpretation would create an absurd result." *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930). "[T]his principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. . . . " *Id.* "[T]o justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense." *Id.* at 60. In this case, the literal meaning of this statute does not lead to an absurd result. On the contrary, it is completely consistent with the announced intention of Congress to level the playing field.

The Court of Appeal concluded that section 3803(c) of the Parity Act was limited to conflicts with the regulations set forth in 12 C.F.R. § 560.220. But nothing in

section 560.220 contradicts the broad preemption of section 3803(c). On the contrary, section 560.220 reiterates the proposition that any housing creditor that complies with the designated regulations will secure the preemptive benefits of the Parity Act:

> Pursuant to 12 U.S.C. 3803, housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation. In accordance with section 807(b) of Public Law 97-320, 12 U.S.C. 3801 note, §§ 560.33, 560.34, 560.35, and 560.210 of this part are identified as appropriate and applicable to the exercise of this authority and all regulations not so identified are deemed inappropriate and inapplicable. . . .

12 C.F.R. § 560.220. Thus, section 560.220 repeats the language in section 3803(c): that state-chartered alternative mortgage lenders may make alternative mortgage transactions notwithstanding any state constitution, law, or regulation.

The Court of Appeal also erred in relying on a 1997 interpretive letter from the OTS. Appendix A, note 14, at App. 24. The Court relied on this letter for the proposition that Congress could not have intended the Parity Act to preempt all state laws, since the OTS used the adjectives "conflicting" and "inconsistent" in analyzing the preemptive effect of the Parity Act. But in this interpretive letter, the OTS did nothing more than identify restrictions which *are* preempted by the Parity Act. The OTS did

not state or even suggest that the Parity Act is limited to conflict preemption or that other state laws and regulations that are not conflicting or inconsistent with the Parity Act are *not* preempted.

Even assuming the OTS did construe the Parity Act to provide for only conflict preemption, the interpretive letter would be entitled to little deference because it was not arrived at after formal adjudication (*Reno v. Koray*, 515 U.S. 50, 61 (1995); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), and because it was not "based on a permissible construction of the statute" (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Broad preemption is consistent with the stated objectives of Congress in enacting the Parity Act. The Parity Act was designed to ensure that borrowers – including elderly homeowners on fixed incomes – have available to them alternative avenues for mortgage finance:

> The Parity Act represents a congressional response to a concern, amongst others, that State bans on mortgages other than traditional fixed-rate mortgages would reduce the overall availability of mortgage credit, since fixed-rate mortgages had become relatively more expensive as the result of increased interest-rate volatility. . . . These concerns prompted Congress to authorize *State*-chartered housing lenders . . . to enter into alternative mortgage transactions.

Grunbeck v. Dime Savings Bank of New York, 74 F.3d 331, 343 (1996) (emphasis in original). As such, the Parity Act was an enabling statute by which Congress permitted

qualified housing creditors to escape from disparate and inconsistent state regulation and gave individuals the ability to take advantage of the equity in their homes. The Parity Act was intended to place state-chartered housing creditors on a level playing field as their federal counterparts. In keeping with this goal, the Parity Act enacted broad preemption of state law, equivalent to the preemption enjoyed by their federal counterparts.[6] To the extent the OTS letter suggests that state law governs all aspects of a housing creditor's operations that are not specifically addressed by OTS regulations, this interpretation would defeat the purpose of Congress. As such, it would have to be rejected.

> "The interpretation put on the statute by the agency charged with administering it is entitled to deference, but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."

F.E.C. v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981) (citations omitted).

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[6] HOLA expressly preempts all state laws concerning federal mortgage lenders. *See de la Cuesta*, 458 U.S. at 162-163. Having wrongly construed the Parity Act as not preemptive of the state laws at issue, the Court of Appeal failed to apply HOLA to determine whether the reverse mortgage terms at issue in this action were also preempted under HOLA. Had the Court done so, it would have reached the inescapable conclusion that the lending transaction at issue in this litigation falls squarely in the purview of both HOLA and its regulations.

Similarly, the Court of Appeal erroneously relied on an OTS advance notice of proposed rule-making. Appendix A, at App. 24. In this notice, the OTS opined that "[t]he limited role the Parity Act plays in the overall regulation of housing creditors has not always been clearly understood." *Id.* However, this OTS notice deserves no deference as it was not a final rule-making or adjudicative action and it frustrates the policy that Congress sought to implement. *See Reno*, 515 U.S. at 61; *F.E.C.*, 454 U.S. at 31-32.

The Court of Appeal erroneously expressed concern that if the section 3803(c) were construed according to its manifest meaning, then the conduct complained of by Respondent would go unregulated. There are multiple reasons why such a view is short-sighted. First, and most obvious, there is no federal reverse mortgage regulation governing *either* federal lenders or state housing creditors. Thus, it appears that the OTS has wisely chosen to monitor the development of this fledgling industry, rather than stifling it with heavy-handed litigation and class action damage suits.

Second, Congress and the Federal Reserve Board have already enacted numerous statutes and regulations affecting mortgage lending generally. For example, Congress and the Federal Reserve Board have adopted comprehensive cost disclosure mechanisms which cover reverse mortgages, namely, the Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*), and "Regulation Z"(12 C.F.R. Pt. 226). Appendix K to Regulation Z is designed for the special circumstances of a reverse mortgage. 12 C.F.R. Pt. 226, App. K.

Third, HOLA, the primary source of regulation of the mortgage lending industry, is fully available for regulation of housing creditors under the express terms of the Parity Act. Under HOLA, Congress delegated broad powers to the Board – now the OTS – to issue rules and regulations concerning lending practices of federal savings and loan associations and to enforce them. *See de la Cuesta*, 458 U.S. at 160-161; *Reich v. Webb*, 336 F.2d 153, 158 (9th Cir. 1964). Section 5(a) of HOLA provides that:

> the [Board] is authorized, under such rules and regulations as [it] may prescribe –
>
> (1) to provide for the organization, incorporation, examination, *operation*, and *regulation* of associations to be known as Federal savings associations (including Federal savings banks) . . .

12 U.S.C. § 1464(a)(1) (emphasis added). HOLA expresses "no limits on the [OTS'] authority to regulate the lending practices of federal savings and loans" such that it "would have been difficult for Congress to give the [OTS] a broader mandate." *De la Cuesta*, 458 U.S. at 161.

The OTS' broad powers under HOLA include enforcement powers. The OTS may issue cease and desist orders and bring an action in federal court for civil penalties and damages. It may also seek remedies not provided in HOLA. *Beverly Hills Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 371 F. Supp. 306, 313 (1973). If the remedy sought by the OTS is within the general enforcement powers contemplated by the statute, then the OTS has broad power in fashioning the appropriate relief. *Id.* The OTS may also bring a complaint against a mortgage lender based in federal common law. *See Reich*, 336 F.2d at

158. Moreover, in keeping with the principle of exclusivity of federal regulation over federally chartered savings and loan associations, the OTS may adopt or impose standards derived from state or general common law principles to effectuate policies implicit in the Act. *Beverly Hills*, 371 F. Supp. at 313. This plenary regulatory authority – which is extended to state-chartered housing creditors by the Parity Act – is hardly an "anything goes" environment where improper conduct of state-chartered lenders would go unchecked.

Any failure by the OTS to designate other regulations in Part 560 of Title 12 as applicable to housing creditors is ultimately immaterial because the conduct complained of in this lawsuit falls within the regulatory ambit of the four designated regulations. The four regulations cover late charges (12 C.F.R. § 560.33), prepayments (12 C.F.R. § 560.34), adjustments to home loans (12 C.F.R. § 560.35) and disclosures for variable rate interest transactions (12 C.F.R. § 560.210). *See* 12 C.F.R. § 560.220. Respondent complains that Petitioners, among other things, allegedly withheld key disclosures, concealed the debt-to-value ratio and misrepresented facts concerning prepayment charges, the applicable interest rate, calculations of the lending value, and various elements of the shared appreciation feature of their reverse mortgage. To the extent the OTS has seen fit to regulate, Petitioners are in full compliance. The remaining OTS regulations – too numerous to list individually – cover areas such as pass through investments, *de minimis* investments, commercial paper and corporate debt securities, suretyship and guaranty, *inter alia*, and do not have any relevance to the

alleged conduct. The OTS has not regulated reverse mortgages for any lender, state or federal, but retains the power to designate additional regulations in section 560.220. It may not be said that the lending activities of state-chartered housing creditors would go unchecked simply because so far only four regulations under HOLA have been designated applicable.

III. THE CALIFORNIA COURT OF APPEAL'S INTERPRETATION OF THE PREEMPTION CLAUSE IS DIRECTLY CONTRARY TO EVERY FEDERAL COURT DECISION THAT HAS ADDRESSED THE PREEMPTION ISSUE

In a reprise of the similar holding by another California Court of Appeal which this Court overruled in *de la Cuesta*,[7] the California Court of Appeal refused to follow the reasoning of *National Home Equity Mortgage Ass'n v. Face*, 239 F.3d 633 (4th Cir.), *cert. denied*, ___ U.S. ___, 122 S. Ct. 58 (2001).

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[7] In *de la Cuesta*, this Court held that a California law which restricted the use of due-on-sale clauses was preempted by HOLA, reversing the decision of the California Court of Appeal (*De la Cuesta v. Fidelity Fed. Sav. & Loan Ass'n*, 121 Cal. App. 3d 328, 175 Cal. Rptr. 467 (1981)), which was based on the Court of Appeal's decision in *Panko v. Pan American Fed. Sav. & Loan Ass'n*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981). *Panko* held that HOLA and its implementing regulations did not preempt the California common law prohibition against due-on-sale clauses in mortgage loan contracts issued by federally chartered savings and loan associations. To the extent this Court rejected the reasoning behind the Court of Appeal's decision in *de la Cuesta*, this Court also overruled *Panko* by implication.

In *Face*, a trade association of state-chartered lenders sued to enjoin the offering of alternative mortgage loans. *Id.* at 635. The District Court and the Fourth Circuit both held that the Parity Act preempted the application of the Virginia law. Virginia argued in *Face* that the Parity Act's preemptive effect upon state law was only *partial* because section 807(b) of the Parity Act[8] directed the Controller of the Currency, the National Credit Union Administration, and the Federal Home Loan Bank Board to "identify, describe, and publish those portions or provisions of their respective regulations that are inappropriate for (and thus inapplicable to), or that need to be conformed for the use of, the non-federally chartered housing creditors to which their respective regulations apply." *Face*, 239 F.3d at 639-640; Pub. L. No. 97-320, § 807(b) (1982), 96 Stat. 1545. The Board did so in 12 C.F.R § 545.33 and the OTS later followed suit in 12 C.F.R. § 560.220. Virginia argued that because the OTS had identified only these four regulations as applicable to state-chartered lenders, state law should be preempted only to the extent it actually conflicted with one of them. *Face*, 239 F.3d at 639-640. This is exactly the conclusion reached by the California Court of Appeal. Virginia went on to assert that, since the Board's original response to section 807(b) had not identified 12 C.F.R. § 560.34 concerning prepayment penalties as an applicable regulation, state law concerning prepayment penalties had not been preempted.

The Fourth Circuit disagreed. First, the Court noted that the prepayment regulation is now deemed applicable (12 C.F.R. § 560.220) and that:

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[8] The language of Section 807(b) now appears as a note under 12 U.S.C. § 3801.

> Second, Virginia can derive little benefit from the original omission. Section 807(b) is not a provision that defines the scope of federal preemption. Rather, it defines the gate through which the non-federally chartered housing creditors must pass in order to obtain the benefits of the Parity Act. If a state lender conforms to the regulations listed in the regulation implementing 807(b), then it will enjoy the preemptive protection that the Act grants in 12 U.S.C. § 3803(c). Accordingly, the implementation of § 807(b) provides Virginia with little support.

Id. at 639-640.

The Court of Appeal acknowledged the reasoning of *Face*, but declined to follow it because it appeared that *Face* could have been resolved on conflict preemption grounds. However, by refusing to view the list of regulations designated by the OTS as defining the scope of preemption, the Fourth Circuit necessarily rejected conflict preemption as the proper office of section 804(c).

The Court of Appeal also rejected *Shinn v. Encore Mortgage Serv.*, 96 F. Supp. 2d 419 (D.N.J. 2000), because it believed that this case could also be explained on conflict preemption principles. In *Shinn*, the New Jersey Court held that the Parity Act preempted state regulation of prepayment penalties. *Id.* at 423-424. The plaintiffs argued that the Parity Act was meant to preempt only those state laws which prohibit alternative mortgages. *Id.* at 425. The District Court rejected this narrow interpretation of the Parity Act as inconsistent with its purpose to create parity between state and federal lenders.

> The language of this section does not support plaintiffs' narrow interpretation of the statute's

> preemptive effect. Nor does the Court agree that the sole purpose of the Act is to enable state lenders to engage in AMTs. A paramount purpose of the Act is create parity between state and federal lenders who engage in AMTs.

Id.

Finally, the Court of Appeal gave no weight to *First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032 (5th Cir. 1994), because it was vacated on other grounds, 42 F.3d 895 (5th Cir. 1995). Although a vacated decision has no precedential effect, *O'Connor v. Donaldson*, 422 U.S. 563, 578 n. 12 (1975), it still constitutes persuasive authority where the *vacatur* did not undermine the reasoning supporting its holding. *United States Dept. of Health & Human Serv. v. FLRA*, 983 F.2d 578, 581-82 (4th Cir. 1992); *Acosta v. Master Maintenance & Constr., Inc.*, 52 F. Supp. 2d 699, 706 (M.D. La.1999). *First Gibraltar* remains persuasive authority because the *vacatur* was based on a statutory amendment, not on any flaw in its reasoning (*see First Gibraltar*, 42 F.3d 895).

In *First Gibraltar*, the Fifth Circuit found Parity Act preemption in the absence of a conflicting designated OTS regulation. *First Gibraltar*, 19 F.3d 1032. The Court noted that federally chartered lenders were permitted to make reverse annuity and line of credit mortgages (*id.* at 1053) and that the purpose of the Parity Act was to put "nonfederally chartered lenders on a level playing field with federal savings associations" (*id.* at 1052). Therefore, the Court said, "these housing creditors may engage in those types of transactions, consistent with OTS regulations as specified in 12 C.E.R. § 545.33(f)." *Id.* at 1053. *First Gibraltar* is not distinguishable in the way the Court of

Appeal purported to distinguish *Face* and *Shinn*, because it finds Parity Act preemption in the absence of a conflict. In short, the Court of Appeal's opinion is irreconcilable with the reasoning of each of the federal courts which has dealt with the Parity Act.

CONCLUSION

For the reasons set forth above, the Court should grant this petition and issue a writ of certiorari to the California Court of Appeal.

Respectfully submitted,

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APPENDIX A

92 Cal.App.4th 917

Court of Appeal, First District, Division 2, California.

Corinne E. BLACK, as Trustee, etc.,
Plaintiff and Appellant,
v.
FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, et al.,
Defendants and Respondents.

No. A092156.
Oct. 5, 2001.

Dario de Ghetaldi, George R. Corey, Millbrae, Corey, Luzaich, Manos & Pliska LLP, Attorneys for Appellant.

James H. Fleming, Edward Romero, Walnut Creek, Fleming & Phillips, LLP, Attorneys for Respondents (Financial Freedom Senior Funding Corp., Beverly Mirtle, MRCo., ULLICO, Inc., Union Labor Life Insurance Co.).

Michael P. Verna, Walnut Creek, Donald A. Velez, Lawrence D. Goldberg, Bowles & Verna, Attorneys for Respondent (James R. Mahoney).

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Herschel T. Elkins, Senior Assistant Attorney General, Ronald Reiter, Supervising Deputy Attorney General, Michele R. Van Gelderen, Deputy Attorney General, Attorney General for the State of California as Amicus Curiae.

HAERLE, J.

I. INTRODUCTION

In 1994, Charles T. Black[1] and Corinne E. Black (the Blacks), then 68 and 67 years of age respectively, entered into a reverse mortgage with Freedom Investment Fund, Inc. (Freedom Investment), using their home as the basis for the mortgage. In 1998, the Blacks, as trustees for the Charles T. Black and Corinne E. Black Trust Agreement, brought this action against Freedom Investment and a host of other corporations, companies and individuals, alleging that the manner of their marketing of the reverse mortgage violated various state laws. The defendants moved for summary judgment, arguing that the Blacks' claims were preempted by three federal statutes and their implementing regulations: the Alternative Mortgage Transaction Parity Act of 1982 (the Parity Act) (12 U.S.C. §§ 3801-3806), the Truth in Lending Act (TILA) (Pub.L. No. 90-321, § 101 (May 29, 1968) 82 Stat. 146; see also 15 U.S.C. § 1601-1667f) and the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) (Pub.L. No. 96-221, § 1 (March 31, 1980) 94 Stat. 132 (codified as amended in scattered sections of 12 U.S.C. & 15 U.S.C.)). The trial court granted the motion. This appeal followed. We reverse.

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[1] Charles Black died during the pendency of this appeal. We shall, nonetheless, refer to appellants in the plural throughout.

II. BACKGROUND

A. *Reverse Mortgages*

Reverse mortgages have been described as a financial planning device for the elderly who are often "house rich, but cash poor." (See Hammond, *Reverse Mortgages: A Financial Planning Device for the Elderly* (1993) 1 Elder L.J. 75, 76 (hereafter Hammond).) A reverse mortgage can address this dilemma by providing a means for converting home equity into cash. (*Ibid.*) In a reverse mortgage, as in a conventional mortgage, the mortgagee or lender advances money to the borrower or mortgagor. However, in a reverse mortgage the borrower is often times not obligated to repay any portion of the loan or the interest on the loan amount until the property is sold, the loan matures or the borrower dies or experiences an extended absence from the premises. (*Id.* at p. 86; see also 15 U.S.C. § 1602(bb)[2].) The interest on the borrowed sums is added to the principal loan amount and the lender acquires a lien against the house in the amount of the initial principal and accumulated interest. (Hammond, *supra*, 1 Elder L.J. at p. 86.)

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[2] 15 U.S.C. section 1602(bb) provides as follows: "The term 'reverse mortgage transaction' means a nonrecourse transaction in which a mortgage, deed of trust, or equivalent consensual security interest is created against the consumer's principal dwelling – [p] (1) securing one or more advances; and [p] (2) with respect to which the payment of any principal, interest, and shared appreciation or equity is due and payable (other than in the case of default) only after – [p] (A) the transfer of the dwelling; [p] (B) the consumer ceases to occupy the dwelling as a principal dwelling; or [p] (C) the death of the consumer."

B. *The Blacks' Reverse Mortgage*

On March 28, 1994, the Blacks entered into a reverse mortgage with Freedom Investment, a non-federally chartered lender, secured by a deed of trust on their home, then valued at $1,060,000. Pursuant to this transaction, the Blacks received $305,455 and Freedom Investment received an interest equal to 70.75% of the "maturity value" of the mortgaged property.[3] From the $305,455 that the Blacks borrowed, they paid $11,249.89 as a loan origination fee and $5,583.47 in other fees, taxes and expenses.

The loan amount of $305,455 was calculated as the present value of $749,950 (representing 70.75% of the value of the Blacks' home) using a 3.75% discount rate over a period of 24.4 years (the Blacks' joint life expectancy). In other words, $305,455 brought forward with 3.75% interest for each year of the Blacks' joint life expectancy should equal $749,950.[4]

The amount ultimately due on the loan, however, would most likely exceed $749,950. If the home appreciated in value, Freedom Investment acquired an interest in a portion of that appreciation, thus increasing the amount

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[3] The reverse mortgage defines the "maturity value" as "the lesser of (i) 93% of the 'Fair Value' of the Property, as defined below in Section 2.5, or (ii) an amount equal to the Property's Initial Value (as defined below) increased at the rate of 13% per annum, compounded annually from the date of this Note to the Maturity Date."

[4] The Blacks contend that this calculation yields an amount slightly greater than 70.75% of the then current value of the home.

ultimately due on the loan and simultaneously increasing the interest rate on the initial borrowed sum.

Moreover, the interest rate was 3.75% only if one of the Blacks survived for the length of their joint life expectancy of 24.4 years and continued to reside at their house. However, if they did not, the effective interest rate would exceed 3.75% because the Blacks' liability was 70.75% of the maturity value of their home regardless of the actual duration of the mortgage (subject to a limited exception).

C. *The Annuity*

The Blacks used $178,333.33 of the loan proceeds to purchase an annuity from the Union Labor Life Insurance Company (Union Labor Life), the terms of which provided for monthly payments of $1,701.30 for life provided that the Blacks made a second payment on the annuity four years later in the amount of $105,926.48. If the Blacks failed to make the second payment, the monthly annuity benefit was reduced to $719.58. The Blacks apparently did not make this second payment.

D. *This Litigation*

1. *The parties*

The Blacks filed this action against 15 defendants.[5] The Blacks contend, without citation to the record, that they dismissed their complaint as to five defendants and took the defaults of four defendants, including Freedom Investment. The defendants that allegedly remained thereafter, and which are the respondents herein, are ULLICO, Inc. (ULLICO), MRCo, Inc. (MRCo), Union Labor Life, Financial Freedom Senior Funding Corporation (Financial Freedom Senior Funding), Beverly Mirtle, and James R. Mahoney. The complaint alleges an intricate relationship between the corporate respondents and Freedom Investment and concludes that the individuality and separateness of these entities ceased and that they should not be permitted to adhere to the fiction of their separate existence. As to the individual respondents, the complaint alleges that Mirtle was a sales person for Freedom Investment and Mahoney the executive vice-president of Financial Freedom Senior Funding.

2. *The allegations*

The Blacks' complaint includes causes of action for elder abuse (Welf. & Inst.Code, §§ 15600 et seq.),

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[5] The Blacks purport to bring this action on behalf of all California residents who have entered into a reverse mortgage with any of the respondents, but the record on appeal includes no indication that the Blacks have yet moved to certify a class.

unlawful business practices (Bus. & Prof.Code, § 17200),[6] fraudulent concealment and negligent misrepresentation.[7] The complaint generally alleges that respondents

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[6] Business and Professions Code section 17209 provides that, "[i]f a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in . . . a state court of appeal . . . the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, *shall be served within three days after the commencement of the appellate proceeding*, provided that the time may be extended by the . . . presiding justice . . . for good cause shown. *No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.*"

> The Blacks did not serve the Attorney General or the applicable district attorney within three days after filing their opening brief. (See *Californians for Population Stabilization v. Hewlett Packard Co.* (1997) 58 Cal.App.4th 273, 285, 67 Cal.Rptr.2d 621.) The Blacks have now served the Attorney General and applicable district attorney, the Attorney General has filed an amicus brief, and respondents have filed an answer to that amicus brief. Accordingly, we find good cause to retroactively extend the time for providing the notice required under Business and Professions Code section 17209. The Blacks' motion for an order extending their time to serve their opening brief on the Attorney General pursuant to Business and Professions Code section 17209 is therefore granted. (Cf. *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 907, fn. 20, 72 Cal.Rptr.2d 73.)

[7] The complaint also included a cause of action based on the Consumer Legal Remedies Act and a cause of action alleging

used "deceptive advertising [and] misleading transactional documents" and that the reverse mortgage was "written in a manner which was designed to disorient, confuse, and upset the average homeowner. . . . " The complaint identifies the following representations as false and misleading: (1) assurances of uninterrupted monthly annuity income, (2) guarantees of the highest monthly payments and the lowest fees and expenses of any home equity conversion plan being offered, and (3) promises of no prepayment charge and the preservation for the Blacks of 25% of the home's future value. The complaint also alleges that Freedom Investment used an unreasonably low projection of home appreciation for its illustrations and inaccurately described the tax characterization of the reverse mortgage transaction.

Another component of the complaint is its allegation that Freedom Investment did not advise the Blacks that they would effectively be prepaying interest inasmuch as Freedom Investment immediately acquired a 70.75% interest in the home even though the amount disbursed to the Blacks was a much smaller amount.[8]

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breach of fiduciary duty but, for reasons unrelated to the issues raised in this appeal, the trial court sustained demurrers without leave to amend as to those two causes of action.

[8] While portions of the complaint could be construed as challenging the terms of the reverse mortgage, the Blacks contend on appeal that their "claims are not based on the illegality or amount of defendants' charges" and that "in its simplest form," "Plaintiffs' complaint . . . alleges that defendants engaged in fraud, elder abuse, and unfair business practices in order to dupe plaintiffs and other elderly California homeowners into entering into reverse mortgage loans they would not have entered into otherwise."

3. *The motion for summary judgment*

Respondents moved for summary judgment solely on the ground that the Parity Act, DIDMCA, TILA and their related regulations preempted the Blacks' causes of action.[9] The Blacks opposed the motion and interjected numerous objections to the evidence on which the motion relied. The trial court granted the motion, concluding that federal law preempted the subject matter of the action.

III. DISCUSSION

A. *General Principles of Preemption*

The supremacy clause of the United States Constitution (art. VI, cl.2) grants Congress the power to preempt state law. (*Crosby v. National Foreign Trade Council* (2000)

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[9] On appeal, respondents also seek affirmance on the ground that there was no factual basis for any of the Blacks' claims. The mere fact that the phrase "there is no triable issue of material fact" appears in the notice of motion is insufficient to indicate that the motion was challenging the factual support for the *merits* of the Blacks' claim. Moreover, respondents' memorandum of points and authorities did not identify the elements of the causes of action much less argue the merits, instead focusing exclusively on the issue of preemption. Because respondents' arguments concerning the merits of the Blacks' claims were not presented to any material extent at all in respondents' motion for summary judgment, we do not consider them in this appeal. (See Cal. Rules of Ct., rule 313(b) ["A memorandum of points and authorities shall contain . . . arguments relied on. . . . "].) This conclusion does not foreclose respondents from moving for summary judgment on the merits after this case returns to the trial court.

530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352.) "Whether federal law preempts state law is fundamentally a question whether Congress has intended such a result. [Citations.] The 'starting presumption' is that Congress has not so intended. [Citations.] Preemption of state law by federal law is found in 'three circumstances.' [Citations.] First, there is so-called 'express preemption': 'Congress can define explicitly the extent to which its enactments pre-empt state law.' [Citations.] Second, there is so-called 'field preemption': '[S]tate law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.' [Citations.] Third, there is so-called 'conflict preemption': '[S]tate law is pre-empted to the extent that it actually conflicts with federal law.' [Citations.] Such conflict must be 'of substance and not merely trivial or insubstantial.' [Citation.] It exists when it is 'impossible . . . to comply with both state and federal requirements' [citations] or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' underlying federal law [citations]. Although 'state law is pre-empted to the extent that it actually conflicts with federal law' [citation], it is preempted only to that extent and no further [citation]." (*Peatros v. Bank of America* (2000) 22 Cal.4th 147, 157-158, 91 Cal.Rptr.2d 659, 990 P.2d 539.)

"Federal regulations have no less pre-emptive effect than federal statutes." (*Fidelity Federal Savings & Loan Association v. de la Cuesta* (1982) 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664.) An agency may preempt state law through regulations that are within the scope of its

statutory authority and that are not arbitrary. (*Id.* at pp. 153-154, 102 S.Ct. 3014.)

Regardless of whether preemption allegedly arises by statute or by regulation, courts are reluctant to infer preemption in ambiguous cases. (See *Maryland v. Louisiana* (1981) 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576; *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 548, 208 Cal.Rptr. 874, 691 P.2d 630 (*Elsworth*); Tribe, American Constitutional Law (3d ed.2000) § 6-28, p. 1175.) It is, therefore, "the burden of the party claiming that Congress intended to preempt state law to prove it" (*Elsworth, supra,* 37 Cal.3d at p. 548, 208 Cal.Rptr. 874, 691 P.2d 630). Particularly in an area of law traditionally occupied by the states, such as the exercise of a state's police powers, "Congress's intent to preempt must be 'clear and manifest' to preempt state law. . . . [Citations.]" (*Spielholz v. Superior Court* (2001) 86 Cal.App.4th 1366, 1371-1372, 104 Cal.Rptr.2d 197 (*Spielholz*).) Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states' police power, and thus subject to this heightened presumption against preemption. (See *California v. ARC America Corp.* (1989) 490 U.S. 93, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 [unfair business practices]; *Smiley v. Citibank* (1995) 11 Cal.4th 138, 148, 44 Cal.Rptr.2d 441, 900 P.2d 690 [consumer protection], affd. (1996) 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed.2d 25; *Spielholz, supra,* 86 Cal.App.4th at p. 1372, 104 Cal.Rptr.2d 197.)

B. *Alleged Preemption under the Parity Act*

1. *The Parity Act*

Respondents contend that three statutes preempt the Blacks' claims. The Parity Act is one of those three statutes.

Congress enacted the Parity Act in 1982 after finding that "increasingly volatile and dynamic changes in interest rates" had "seriously impaired the ability of housing creditors to provide consumers with fixed-term, fixed-rate credit secured by interests in real property. . . . " (12 U.S.C. § 3801(a)(1); see also Pub.L. 97-320, § 802 (Oct. 15, 1982) 96 Stat. 1545.) Congress concluded that the availability of loans other than traditional fixed-rate, fixed-term transactions was essential to an adequate supply of loans secured by residential property (12 U.S.C. § 3801(a)(2); 3802(1)) and that federally chartered depository institutions had already been given permission to engage in such alternative mortgage financing (12 U.S.C. § 3801(a)(3)).

In light of these findings, Congress enacted the Parity Act "to eliminate the discriminatory impact that . . . regulations [authorizing federal institutions to engage in alternative mortgage financing] have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are

in conformity with the regulations issued by the Federal agencies." (12 U.S.C. § 3801(b).)[10]

The substance of the Parity Act is found in title 12 United States Code section 3803, which provides in relevant part as follows: "In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making . . . alternative mortgage transactions, housing creditors may make . . . alternative mortgage transactions, except that this section shall apply – [p] (1) with respect to banks, only to [transactions made in accordance with certain regulations issued by the Comptroller of the Currency]; [p] (2) with respect to credit unions,

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[10] The statute defines alternative mortgage transactions as "a loan or credit sale secured by an interest in residential real property . . . [p] (A) in which the interest rate or finance charge may be adjusted or renegotiated; [p] (B) involving a fixed-rate, but which implicitly permits rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule; or [p] (C) involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed-term transactions, including without limitation, transactions that involve the sharing of equity or appreciation." (12 U.S.C. § 3802(1).) The parties do not dispute that this definition includes reverse mortgage transactions. Their agreement appears reasonable inasmuch as alternative mortgage transactions include debts that can mature over an interval shorter than the amortization schedule and in which the lender shares in the equity and sometimes the appreciation in the mortgaged property. (See 12 U.S.C. § 3802(1)(B) & (C).) The Office of Thrift Supervision has also concluded that the Parity Act covers reverse mortgages. (Off. of Thrift Supervision, interpretative letter (Oct. 20, 1995) p. 6.)

only to [transactions made in accordance with other regulations issued by the National Credit Union Administration Board]; [p] (3) with respect to all other housing creditors . . . only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section." (12 U.S.C. § 3803(a).)[11] On the subject of preemption, the Parity Act provides that "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation." (12 U.S.C. § 3803(c).)

A note to the statute that created the Parity Act directed "the Comptroller of the Currency, the National Credit Union Administration," and the predecessor to the

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[11] "Housing creditor" is defined within the Parity Act in pertinent part as including "any person who regularly makes loans, credit sales, or advances secured by interests in [residential real property]; or [p] . . . any transferee of any of them. [p] A person is not a 'housing creditor' with respect to a specific alternative mortgage transaction if, except for this chapter, in order to enter into that transaction, the person would be required to comply with licensing requirements imposed under State law, unless such person is licensed under applicable State law and such person remains, or becomes, subject to the applicable regulatory requirements and enforcement mechanisms provided by State law." (12 U.S.C. § 3802(2)(C) & (D).)

Office of Thrift Supervision (OTS), the Federal Home Loan Bank Board (see *United States v. Gaubert* (1991) 499 U.S. 315, 319, fn. 1, 111 S.Ct. 1267, 113 L.Ed.2d 335), to "identify, describe, and publish those portions or provisions of their respective regulations that are inappropriate for (and thus inapplicable to), or that need to be conformed for the use of, the nonfederally chartered housing creditors to which their respective regulations apply. . . . " (Pub.L. No. 97-320, § 807(b) (Oct. 15, 1982) 96 Stat. 1545). The OTS's current response to the note's instruction appears in 12 Code of Federal Regulations part 560.220 (part 560.220) and is as follows: "Pursuant to 12 U.S.C. 3803, housing creditors . . . may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation. In accordance with section 807(b) of Public Law 97-320, 12 U.S.C. 3801 note, §§ 560.33 [concerning late charges], 560.34 [concerning treatment of prepayments and prepayment penalties], 560.35 [concerning loan adjustments], and 560.210 [concerning disclosures for variable rate transactions] of this part are identified as appropriate and applicable to the exercise of this authority and all regulations not so identified are deemed inappropriate and inapplicable." (12 C.F.R. § 560.220 (2000).)[12]

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[12] The Parity Act provided the states a three-year period during which to opt out of its operation. (See 12 U.S.C. § 3804.) The OTS has concluded that California did not opt out of application of the Parity Act (see Off. of Thrift Supervision, interpretative letter (May 3, 1996) p. 6) and the parties do not argue otherwise.

2. *The Arguments*

The Blacks construe title 12 United States Code section 3803(c) in conjunction with part 560.220 and argue that the Parity Act only preempts claims concerning the areas identified in part 560.220, namely, late charges, prepayments, prepayment penalties, loan adjustments, and disclosures for variable rate transactions. Respondents argue that part 560.220 does not define the scope of preemption. They instead rely on title 12 United States Code section 3803(c) and the purpose of the Parity Act to argue that non-federally chartered institutions should enjoy the same preemption of state claims that federally chartered institutions receive under the statute applicable to them – the Home Owners' Loan Act of 1933, 12 United States Codes 1461 et seq. (HOLA). According to respondents, preemption under HOLA is broad enough to preclude the Blacks' claims had they been brought against federal institutions and that the Parity Act extended to state-chartered housing creditors that same protection.

3. *Analysis*

We begin by considering whether the Parity Act expressly preempts claims such as the ones presented in this case. The Parity Act permits an alternative mortgage transaction to be made by a housing creditor "in accordance with [section 3803,] notwithstanding any State constitution, law or regulation." (12 U.S.C. § 3803(c); see also 12 C.F.R. § 560.220 (2000).) Transactions that are "in accordance with" section 3803 are those that are made "in accordance with regulations governing alternative mortgage transactions as issued by the Director of the

[OTS] for federally chartered savings and loan associations. . . . " (12 U.S.C. § 3803(a)(3).) Had that language been included expressly in the preemption provision rather than by inference only, the provision would have read: an alternative mortgage transaction may be made by a housing creditor in accordance with regulations governing alternative mortgage transactions as issued by the Director of the OTS for federally chartered savings and loan associations, notwithstanding any State constitution, law or regulation.

This language is susceptible to at least two interpretations. On one hand, the phrase "state constitution, law, or regulation" is modified with the adjective "any," supporting the argument that the preemption provision precludes all state regulation of alternative mortgage transactions involving state-chartered housing creditors.

On the other hand, the phrase "any state constitution, law, or regulation" can be interpreted as implicitly limited to those that prohibit or impede alternative mortgage transactions or that *conflict* with federal regulations deemed applicable to non-federally chartered housing creditors, i.e., the regulations that the transaction must be made "in accordance with." This interpretation would leave broad room for state regulation because there are only four federal regulations with which the transactions of housing creditors must comply. (See 12 C.F.R. § 560.220.)

Other provisions of the Parity Act support the latter interpretation. The Parity Act requires housing creditors to be "licensed under applicable State law" and "subject

to the applicable regulatory requirements and enforcement mechanisms provided by State law." (12 U.S.C. § 3802(2).) Here, for example, certain housing creditors in California are required to be licensed under the California Finance Lenders Law (see Fin.Code, § 22000, 22100, [requiring license for finance lenders]; 22009 [defining finance lenders as including persons engaged in the business of making consumer loans]; 22203 [defining consumer loan as including certain loans secured by real property]). That law establishes permissible charges and fees on loans (Fin.Code, § 22306), prohibits false, misleading or deceptive statements (Fin.Code, § 22161), and provides that unconscionable loans violate the statute (Fin.Code, § 22302). When Congress enacted the Parity Act, it was surely aware that such forms of state regulation then existed or, at least, could come into existence in the future because it had no control over the changes and developments that states could subsequently make to their regulatory schemes. Given the breadth accorded the states in regulating "housing creditors" in 12 United States Code section 3802, the preemption language of 12 U.S.C. section 3803(c) can certainly be interpreted as not extending to state laws that concern aspects of those transactions other than those addressed by the four applicable federal regulations.

However, we need not conclude that this is the only reasonable interpretation of the Parity Act's preemption language in order to reject express preemption in this case. "As is always the case in our pre-emption jurisprudence, where 'federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the

States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ' " (*California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.* (1997) 519 U.S. 316, 325, 117 S.Ct. 832, 136 L.Ed.2d 791, quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447; see also *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 317, 101 S.Ct. 1124, 67 L.Ed.2d 258 ["Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has *unmistakably so ordained.*' "], italics added; *Elsworth, supra,* 37 Cal.3d at p. 548, 208 Cal.Rptr. 874, 691 P.2d 630 ["Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it."].) As our analysis has illustrated, the preemption language of the Parity Act does not contain a clear manifestation of congressional intent to preempt all state laws concerning the terms and marketing of alternative mortgage transactions. Absent such clear manifestation, the Parity Act does not expressly preempt claims such as those brought by the Blacks in this action.

The Parity Act and part 560.220 do not impliedly preempt the Blacks' claims either. The regulations deemed applicable to non-federally chartered housing creditors are so limited in number as to be insufficient to occupy the field (see 12 C.F.R. § 560.220 (2000)). (Cf. *ITEL Containers Intl. Corp. v. Huddleston* (1993) 507 U.S. 60, 70-71, 113 S.Ct. 1095, 122 L.Ed.2d 421 [concluding the

federal regulatory scheme at issue in that case was not sufficiently pervasive to occupy the field].)

The last form of preemption is conflict preemption. This form of preemption can exist through direct conflict, which respondents do not contend exists here, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, which respondents contend will occur here. (See *Spielholz, supra,* 86 Cal.App.4th at p. 1371, 104 Cal.Rptr.2d 197.) Whether state law creates such an obstacle turns on Congress's purposes and objectives in enacting the Parity Act.

Congress expressly stated that the purpose of the Parity Act was to "eliminate the discriminatory impact that those regulations have upon nonfederally chartered housing creditors" and provide non-federally chartered housing creditors "with parity with federally chartered institutions by authorizing all housing creditors to make, purchase, and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies." (12 U.S.C. § 3801(b).) Respondents argue that this language indicates that the purpose of the Parity Act is the achievement of absolute parity with federally chartered lending institutions. Thus, if those entities enjoy complete preemption of state regulation of their transactions, so should state-chartered lending institutions.

We are not persuaded by respondents' expansive view of Congress's purpose in enacting the Parity Act. Of course, absolute parity would achieve the results that

Congress sought, but so would much less, such as simply authorizing non-federally chartered housing creditors to engage in alternative mortgage financing. The statute as a whole, in particular the permission retained by the states to regulate housing creditors (see 12 U.S.C. § 3802(2)), counsels against respondents' generous interpretation of congressional purpose, an interpretation that would permit non-federally chartered housing creditors to present information to lenders in a misleading, distorted or even inaccurate fashion with impunity because of the lack of *federal* regulation.

For similar reasons, respondents' contention that the goal of the Parity Act is national uniformity in the regulation of state-chartered housing lenders with respect to alternative mortgage transactions is also flawed. Given the dearth of applicable federal regulations, the national uniform standard for state-chartered housing lenders would be "anything goes." That is hardly a uniform standard.

Moreover, different treatment of federally and non-federally chartered housing creditors is reasonable given that they are very differently situated. "[S]avings associations are subject to a comprehensive regime of regular examination, supervision, and enforcement to determine their compliance with applicable laws and regulations[,]" while "[n]on-depository institution state housing creditors are not." (65 Fed.Reg. 17811, 17816 (Apr. 5, 2000).)

This distinction is significant. For example, in *Spitz v. Goldome Realty Credit Corp.* (1991) 210 Ill.App.3d 215, 155 Ill.Dec. 43, 569 N.E.2d 43, affirmed (1992) 151 Ill.2d 71, 175 Ill.Dec. 727, 600 N.E.2d 1185, the court considered

whether HOLA preempted an Illinois statute upon which the plaintiff relied in suing a subsidiary service corporation of a federal savings association. (155 Ill.Dec. 43, 569 N.E.2d at p. 45.) In that case "[t]here [was] no question that the doctrine of preemption applie[d] with respect to the parent corporation [citation]; nor [did] the parties dispute that there [was] exclusive federal regulation of federally chartered savings associations and that the Bank Board ha[d] the exclusive and plenary power to 'regulate all the aspects of the operations of Federal associations.' [Citation.] At issue [was] whether the preemption that applie[d] to the parent federal savings associations [was] applicable to the state chartered subsidiary service corporation." (*Id.* at p. 46.)

The court concluded that service corporations did not enjoy the same broad preemption of state law as their federally chartered parent organizations, reasoning as follows: "[N]either Congress nor the Bank Board has attempted to set forth a comprehensive regulatory scheme for service corporations as they did for their federally chartered parent associations. Recognizing the lack of such a comprehensive scheme, it is difficult to conceive that Congress and the Bank Board would only regulate the home mortgage activities of service corporations in selected areas if they did not intend to subject these entities to additional state regulation. An intent to preempt without providing a comprehensive regulatory scheme could lead to the intolerable result of permitting service corporations to perform lending activities, which are traditionally highly regulated, unfettered by *any* regulation." (155 Ill.Dec. 43, 569 N.E.2d at p. 48; see also 175 Ill.Dec. 727, 600 N.E.2d at p. 1187 ["Although service

corporations are regulated by the Bank Board, they are not regulated to the same extent as federal associations."].) Similarly, here, it would be odd indeed to provide to non-federally chartered housing creditors, entities that are subject to little federal regulation, the same relief from state regulation that HOLA affords heavily-regulated federally chartered institutions.

We reject respondents' interpretation of congressional purpose and conclude that Congress sought to permit non-federally chartered housing creditors to engage in alternative mortgage financing so long as they complied with applicable federal regulations. Permitting the Blacks to pursue their claims does not stand as an obstacle to that purpose. The Blacks' complaint challenges the adequacy and completeness of disclosures and representations regarding the reverse mortgage. These claims do not seek to prohibit or impede the making of alternative mortgage transactions that comport with the applicable federal regulations; they simply require adequate disclosures. Nor do their claims tread on the areas of federal regulation applicable to non-federally chartered housing creditors, namely, late charges, prepayments and prepayment penalties, loan adjustments, and disclosures for variable rate transactions. (See 12 C.F.R. § 560.220 (2000).) Conflict preemption simply does not apply in this instance.

Our conclusion that the Parity Act does not expressly, impliedly or through conflict preempt the Blacks' claims is consistent with the OTS's interpretation of the preemptive scope of part 560.220. We defer to a federal agency's construction of its own regulations and the statute it is charged to administer. (See *Udall v. Tallman* (1965) 380

U.S. 1, 16-17, 85 S.Ct. 792, 13 L.Ed.2d 616.) Last year, the Director of OTS issued an advance notice of proposed rulemaking in which she explained that "[t]he Parity Act . . . authorizes housing creditors to make alternative mortgage loans as long as the transactions are 'in accordance with' appropriate and applicable OTS regulations. The Act does not grant housing creditors the same powers as federal savings associations outside of the context of alternative mortgage transactions. Even within that context, state law governs those aspects of a housing creditor's operations not covered by regulations designated as applicable to alternative mortgage transactions under the Parity Act. The limited role the Parity Act plays in the overall regulation of housing creditors has not always been clearly understood."[13] (65 Fed.Reg., *supra*, at pp. 17815-17816.)[14]

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[13] Respondents urge us not to take judicial notice of this notice of proposed rulemaking. Evidence Code section 451 mandates judicial notice of "[a]ny matter made a subject of judicial notice by . . . Section 1507 of Title 44 of the United States Code." (Evid.Code, § 451, subd. (b).) That federal statute provides that "[t]he contents of the Federal Register shall be judicially noticed. . . . " (44 U.S.C. § 1507.) We therefore reject respondents' argument and grant the Blacks' request to take judicial notice of portions of the Federal Register. In all other respects, we deny the Blacks' motion for judicial notice.

[14] Additionally, in 1997, an interpretative letter issued by the OTS similarly explained that under the Parity Act, "[a]s long as the Company complies with the requirements of . . . OTS regulations [identified in part 560.220] in making and enforcing its [adjustable rate mortgage] loans, the Company need not comply with *conflicting or inconsistent* state restrictions." (Off. of Thrift Supervision, interpretative letter (Feb. 10, 1997) p. 3, italics added.) If OTS interprets the Parity Act as preempting all

Respondents contend that *National Home Equity Mortgage Assn. v. Face* (4th Cir.2001) 239 F.3d 633 (*Face*) and *Shinn v. Encore Mortgage Services, Inc.* (D.N.J.2000) 96 F.Supp.2d 419 (*Shinn*) support their preemption argument.

The *Face* decision does not provide us much assistance because the case concerned the preemption of a state law limiting prepayment fees (see *Face, supra,* 239 F.3d at p. 635), a subject addressed in a federal regulation specifically identified in part 560.220 as applicable to non-federally chartered housing creditors. That regulation permits prepayment fees so long as they are agreed to in the loan agreement. (See *Face, supra,* 239 F.3d at p. 639.) Thus, conflict preemption was manifest. The state sought to avoid this result by arguing that the Parity Act does not preclude states from regulating areas that are not peculiar to alternative mortgage transactions, that is, that apply to common traditional fixed-rate, fixed-term transactions as well as alternative mortgage transactions. (*Face, supra,* 239 F.3d at p. 636.) The court concluded that the regulation of prepayment penalties was within the regulation of alternative mortgage transactions and that the Parity Act therefore preempted the state law limiting prepayment fees. (*Face, supra,* 239 F.3d at pp. 638, 640.)

The *Face* decision also opines, however, that part 560.220 "is not a provision that defines the scope of federal preemption. Rather, it defines the gate through

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state restrictions, the use of the adjectives "conflicting" and "inconsistent" would have been unnecessary.

which the non-federally chartered housing creditors must pass in order to obtain the benefits of the Parity Act. If a state lender conforms to the regulations listed in the regulation implementing § 807(b) [12 c.f.r. § 560.220], THEN IT WILL ENJOY THE PREEMPTIVE PROTECTION THAT THE Act grants in 12 U.S.C. § 3803(c)." (*Face, supra,* 239 F.3d at p. 640.) However, because the state law at issue in that case limited prepayment fees, a subject expressly covered by an applicable federal regulation, the court did not need to consider, as we must, the scope of "the preemptive protection that the Act grants."

Moreover, the framing of the question in the *Face* case demonstrates that that court did not reach a result contrary to the one we adopt here. The Fourth Circuit explained: "The particular issue presented in this case is whether a non-federally chartered institution in Virginia may require and enforce a prepayment fee in a mortgage agreement notwithstanding Virginia's limitation on prepayment penalties as contained in Virginia Code §§ 6.1-330.83 and 6.1-330.85. The resolution of this issue depends on whether the OTS has issued regulations authorizing prepayment fees as part of its regulations for alternative mortgage transactions, because if it has authorized the collection of prepayment fees in alternative mortgage transactions, then Virginia may not apply its law proscribing such prepayment fees if the non-federally chartered housing creditor has otherwise complied with the requirements of the Parity Act." (*Face, supra,* 239 F.3d at p. 638.) Thus, the Fourth Circuit found it necessary to consider whether the Virginia statute conflicted with a federal regulation pertaining to alternative mortgage transactions. Here, we have no such conflict.

Shinn, supra, is similarly uninstructive because it also considers whether the Parity Act preempts a state law prohibiting prepayment fees. (*Shinn, supra,* 96 F.Supp.2d at p. 422.) The plaintiffs in *Shinn* argued that the Parity Act only preempts state laws that completely prohibit or obstruct the creation of alternative mortgage transactions. (*Shinn, supra,* 96 F.Supp.2d at p. 425.) The court concluded that the language of the statute did not "support plaintiffs' narrow interpretation of the statute's preemptive effect" and concluded that New Jersey's prepayment law was preempted by the Parity Act. (*Id.* at pp. 425-426.)[15]

Here, the Blacks' claims relate to matters that are *not addressed* by the federal regulations that part 560.220 identifies as applying to non-federally chartered housing creditors. Thus, *Face* and *Shinn,* cases considering preemption in that context, are inapposite and, for the reasons given above, we conclude that the Parity Act does not preempt the Blacks' claims.

C. *Alleged Preemption under TILA*

Respondents also contend that the Blacks' claims are preempted by TILA. We disagree.

Clearly, there is no express preemption. Rather than limiting the applicability of state law, TILA emphasizes the continued role of state law, stating that it does "not annul, alter, or affect the laws of any State relating to the

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[15] Respondents also cite *First Gibraltar Bank, FSB v. Morales* (5th Cir.1994) 19 F.3d 1032, but that decision has been vacated (see *First Gibraltar Bank, FSB v. Morales* (5th Cir.1995) 42 F.3d 895).

disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency." (15 U.S.C. § 1610(a)(1); see also 15 U.S.C. § 1610(b) ["except to the extent that those State laws are inconsistent with any provisions of section 1639 of this title, and then only to the extent of the inconsistency."].) A federal regulation implementing TILA explains, in relevant part, that "[a] State law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of the Federal law . . . [and] [a] State law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the Federal law, or it if [sic] requires the use of a term different from that required in the Federal law to describe the same item." (12 C.F.R. § 226.28(a)(1).)

Respondents argue that a state law like Business and Professions Code section 17200 would impose subjective standards of "unfairness," thus contradicting the requirements of federal law. Even if the disclosures provided to the Blacks met all of the requirements of TILA and its implementing regulations, which are known as Regulation Z (see 12 C.F.R. part 226), an inconsistency or contradiction with federal law does not exist merely because the state requires disclosures in *addition* to those required by and under TILA. (Cf. 12 C.F.R. § 226.28(a)(1); see also 12 C.F.R. § 226, Supp. I-Official Staff Interp. § 226.28(a)(3), p. 434 ["Generally, State law requirements that call for the disclosure of items of information not covered by the Federal law, or that require more detailed disclosures, do not contradict the Federal requirements."].) Respondents'

vague assertions of a contradiction between state and federal law are insufficient to satisfy their burden of proving Congress's intent that TILA preempt claims such as those brought by the Blacks. (See *Elsworth, supra,* 37 Cal.3d at p. 548, 208 Cal.Rptr. 874, 691 P.2d 630.)

Respondents also rely on 12 Code of Federal Regulations part 226.28(a)(2)(i) which provides: "State law requirements are inconsistent with the requirements contained in sections 161 (Correction of billing errors) or 162 (Regulation of credit reports) of the Act [15 U.S.C.A. §§ 1666 or 1666a] and the implementing provisions of this regulation and are preempted if they provide rights, responsibilities, or procedures for consumers or creditors that are different from those required by the Federal law." Respondents latch onto the word "different" and argue that state laws that are merely "different" from federal laws are preempted by TILA. But by its express terms, 12 Code of Federal Regulations part 226.28(a)(2)(i) concerns correction of billing errors and regulation of credit reports, two aspects of lending that are not at issue here. Respondents have not established that TILA or its regulations expressly preempt the Blacks' claims.

Implied preemption has no application here either. TILA preempts only "inconsistent" state laws, thus implicitly negating occupation of the field. (See *Mason v. General Finance Corp.* (4th Cir.1976) 542 F.2d 1226, 1230.)

Nor does conflict preemption apply in this instance. As we have explained, respondents have not identified any direct conflict. Moreover, the purpose of TILA, relevant to this action, is the assurance of "a meaningful

disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . . " (15 U.S.C. § 1601(a).) Stated more generally, TILA is designed to protect consumers from inaccurate and unfair credit practices. (See *Fairley v. Turan-Foley Imports, Inc.*, (5th Cir.1995) 65 F.3d 475, 477.) The Blacks' claims advance this purpose, rather than thwart it.

Our conclusion is consistent with decisions reached by federal courts. In *Williams v. First Government Mortgage & Investors Corp.* (D.C.Cir.1999) 176 F.3d 497 (*Williams*), a borrower brought suit under the District of Columbia Consumer Protection Procedures Act (CPPA), alleging that the lender knowingly took advantage of his inability to protect his interests in the loan transaction and knowingly made him a loan he could not repay with any reasonable probability. (*Williams, supra,* 176 F.3d at p. 498.) The United States Court of Appeal for the District of Columbia rejected the argument that TILA preempted the borrower's CPPA claims. (*Williams, supra,* 176 F.3d at pp. 499-500.) The court explained that TILA and CPPA "have quite different purposes and impose quite different requirements. TILA mandates the disclosure of certain documents in lending transactions. [Citation.] The CPPA provides substantive protections for borrowers against unconscionable loan terms and provisions. [Citation.] Nothing in TILA or its legislative history suggests that Congress intended the Act's disclosure regime to provide the maximum protection to which borrowers are entitled nationwide; states remain free to impose greater protections for borrowers. . . . We thus hold that TILA does not preempt the CPPA and that TILA compliance does not

immunize lenders . . . against CPPA liability. [Citations.]" (*Id.* at p. 500.)

The United States District Court for the Northern District of Illinois reached a similar result in *Heastie v. Community Bank of Greater Peoria* (N.D.Ill.1988) 690 F.Supp. 716 (*Heastie*). In that case, an elderly woman sued a mortgage company and mortgage lender under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), alleging predatory lending practices, such as the use of misrepresentations in order to exact "oppressive" finance charges in the refinancing of her home loan. (See *Heastie, supra,* 690 F.Supp. at p. 717.) Defendants argued that TILA preempted the Consumer Fraud Act claim. (*Heastie, supra,* 690 F.Supp. at p. 720.) The court rejected this argument, reasoning in part as follows: "Obviously, compliance with both the TILA and the Consumer Fraud Act is not a physical impossibility – compliance with the TILA does not imply a violation of the Consumer Fraud Act. It also seems that the Consumer Fraud Act promotes rather than hinders the goals of the TILA. The Consumer Fraud Act prohibits, *inter alia,* 'deceptive practices [employed] in the conduct of any trade or commerce . . . ' [citation], thereby promoting the TILA's goal of 'the informed use of credit,' [citation], in a range of conduct larger than that covered by the disclosure provisions in the TILA." (*Heastie, supra,* 690 F.Supp. at p. 721.)

Consistent with these decisions and our own understanding of TILA and its implementing regulations, we conclude that TILA does not preempt the Blacks' claims.

D. *Alleged Preemption under DIDMCA*

Lastly, respondents contend that to the extent the Blacks claim that the loan origination fees, interest charges and the large cash advance fee were unfair and unconscionable, their claims are preempted. Respondents' motion for summary judgment similarly focused solely on the preemptive effect of DIDMCA on these limited aspects of the Blacks' claims.

However, the Blacks concede that they do not challenge the fees or interest rates themselves. Given that respondents do not contend that DIDMCA preempts any other aspect of the Blacks' claims, we find no DIDMCA preemption on this record.

IV. DISPOSITION

We reverse the entry of summary judgment in favor of respondents. Costs on appeal are awarded to the Blacks.

We concur: KLINE, P.J., and LAMBDEN, J.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

Charles T. Black, et al.
Plaintiffs,
vs.
Freedom Investment Fund, Inc., et al.
Defendants.
_____/

Case No. 406451
ORDER
(Filed Apr. 26, 2000)

Defendants' motions for Summary Judgment, Summary Adjudication, Judgment on the Pleadings and To Strike came on regularly for hearing on February 25, 2000. Dario De Ghetaldi, Esq., of Corey, Luzaich, Manos & Pliska LLP appeared on behalf of plaintiffs Charles and Corrine Black, James H. Fleming, Esq., of Fleming & Phillips LLP appeared on behalf of defendants ULLICO, Inc., MRCo, Inc., The Union Labor Life Insurance Company, Financial Freedom Senior Funding Corporation, and Beverly Mirtle. Michael P. Verna, appeared on behalf of defendants John Vogt, Howard Hull, and James R. Mahoney. Having considered the arguments of counsel, the points and authorities and all admissible and competent supporting evidence and declarations, the Court now rules as follows:

1. This court declines to specifically rule on each of the seventy-six objections raised by plaintiffs. See *Biljac v. 1st Interstate Bank of Oregon* (1990) 218 Cal App 3d 1410. Only competent and admissible evidence has been considered in the present ruling.

2. The court finds that there is no triable issue of material fact. The Defendants' Motions For Summary Judgment are hereby GRANTED, the subject matter of this action having been preempted by Federal Law. Plaintiffs' claims cannot be established in this court as a matter of law and defendants are entitled to summary judgment.

3. The Motion for Summary Judgment having been granted, the defendants' Motions For Summary Adjudication, Motion for Judgment on the Pleadings and Motions to Strike are DENIED as moot.

DATED: APR 26 2000

/s/ George A. Miram
HONORABLE
GEORGE A. MIRAM

APPENDIX C

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MRCo, Inc. and Beverly Mirtle

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

CHARLES T. BLACK and CORINNE E. BLACK, Trustees of the CHARLES T. BLACK AND CORINNE E. BLACK TRUST AGREEMENT dated April 20, 1982,	No. 406451 [PROPOSED] JUDGMENT (Filed Jul. 7, 2000)

Plaintiffs,

v.

FREEDOM INVESTMENT FUND, INC., et al.,

Defendants.

_____/

This Court, having on April 26, 2000 entered the order granting the Motions For Summary Judgment of defendants Financial Freedom Senior Funding

Corporation, ULLICO Inc., The Union Labor Life Insurance Company, MRCo, Inc., Beverly Mirtle, (sued herein as "Beverly Myrtle") John Vogt, Howard Hull and James R. Mahoney and having ordered entry of judgment as requested in said motions:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of defendants Financial Freedom Senior Funding Corporation, ULLICO Inc., The Union Labor life Insurance Company, MRCo, Inc., Beverly Mirtle, (sued herein as "Beverly Myrtle") John Vogt, Howard Hull and James R. Mahoney (collectively "Defendants") and against plaintiffs Charles T. Black and Corinne E. Black (collectively "plaintiffs"), that plaintiffs shall take nothing against Defendants by their complaint and that Financial Freedom Senior Funding Corporation, ULLICO Inc., The Union Labor Life Insurance Company, MRCo, Inc., Beverly Mirtle, John Vogt, Howard Hull and James R. Mahoney shall recover costs in the amount ~~of $~~to be determined pursuant to a memorandum of costs to be filed with this Court.

DATED: ~~May~~ ____, 2000 JUL 07 2000

/s/ George A. Moran
JUDGE OF THE
SUPERIOR COURT

APPENDIX D

Court of Appeal, First Appellate District,
Division Two – No. A092156
S102089

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CORINNE E. BLACK, as Trustee, etc.
Plaintiff and Appellant,

v.

FINANCIAL FREEDOM SENIOR
FUNDING CORPORATION, et al.,
Defendants and Respondents.

(Filed Jan. 23, 2002)

Petition for review DENIED.

/s/ GEORGE
Chief Justice

---

(2)

Supreme Court U.S.
FILED
MAY 28 2002
OFFICE OF THE CLERK

No. 01-1591

In The

Supreme Court of the United States

ULLICO, INC., MRCO, INC., THE UNION LABOR LIFE INSURANCE COMPANY, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, and BEVERLY MIRTLE,

Petitioners,

vs.

CORINNE E. BLACK, Trustee,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Does the Alternative Mortgage Transaction Parity Act preempt state law claims for elder abuse, fraud, and unfair business practices?

LIST OF PARTIES

PETITIONERS:

ULLICO Inc.; MRCo, Inc.; The Union Labor Life Insurance Company; Financial Freedom Senior Funding Corporation; and Beverly Mirtle.

RESPONDENT:

Corinne E. Black, Surviving Trustee of the Charles T. Black and Corinne E. Black Trust Agreement dated April 20, 1982.

OTHER:

Respondent is informed and believes that defendant James R. Mahoney, although not named as a petitioner, will file a joinder to the petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. SUMMARY OF ARGUMENT	2
II. THE CALIFORNIA COURT OF APPEAL PROPERLY CONSTRUED THE PARITY ACT AND ITS IMPLEMENTING REGULATIONS	3
A. The Scope of Preemption Under the Parity Act Is Limited	3
B. Petitioners Ignore the Interplay Between 12 U.S.C. §§ 3803(a), 3803(c), and 3802...	5
C. The History of the Parity Act and Its Implementing Regulations Support the Interpretation of the California Court of Appeal	9
1. Preemption in 1994 Under Former 12 C.F.R. § 545.33	9
2. The 1996 Adoption of 12 C.F.R. § 560.220	10
3. Public Statements by the Director of the OTS and One of the Authors of the Parity Act Support a Construction of Limited Scope of Preemption	13

TABLE OF CONTENTS – Continued

Page

II. THE OPINION OF THE CALIFORNIA COURT OF APPEAL DOES NOT CONFLICT WITH THE OPINION OF ANY OTHER COURT 16

A. The Parity Act Cases Cited by Petitioners Do Not Conflict with the *Black* Decision 16

B. The Other Cases Cited by Petitioners Do Not Conflict with the *Black* Decision 19

III. THE DECISION OF THE *BLACK* COURT IS CONSISTENT WITH OTHER DECISIONS ON THE SCOPE OF PREEMPTION OF STATE LAW BY FEDERAL BANKING LAW 21

IV. PETITIONERS FAIL TO STATE A NUMBER OF SIGNIFICANT FACTS AND MISSTATE THE RECORD IN SEVERAL AREAS 24

A. Petitioners' Recitation of the Facts Is Argumentative and Fails to Adequately Describe the Allegations of Respondent's Complaint 24

B. Petitioners' Own Evidence Raised a Triable Issue of Fact on the Issue of Preemption 25

C. Petitioners Offered the Interpretive Letter from the Office of Thrift Services That They Now Claim the Court of Appeal Erred in Considering 26

D. Petitioners Failed to Offer any Evidence to Support Their Standing to Claim Preemption 28

TABLE OF CONTENTS – Continued

Page

E. Petitioners' Stance on the Scope of Preemption Has Been Inconsistent 29

V. CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Ansley v. Ameriquest Mortgage Co., 194 F.Supp.2d 1062 (C.D.Cal. 2002) 17, 18

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) 4

Beffa v. Bank of the West, 152 F.3d 1174 (9th Cir. 1998) 23

Black v. Financial Freedom Senior Funding Corp., 92 Cal.App.4th 917 (2001) ..... *passim*

Briggs v. Countrywide Funding Corp., 949 F.Supp. 812 (M.D.Ala. 1996) 23

California Div. Of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997) 8

California v. ARC America Corp., 490 U.S. 93 (1989) 4

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 3

Eureka Federal Savings and Loan Ass'n v. Kidwell, 937 F.2d 612 (9th Cir. 1991) 19

Federal Deposit Insurance Corporation v. Stahl, 89 F.3d 1510 (11th Cir. 1996) 21

Federal Savings & Loan Ins. Corp. v. Kidwell, 716 F.Supp. 1315 (N.D.Cal. 1989) 19, 20

Fenning v. Glenfed, Inc., 40 Cal.App.4th 1285 (1995) 20

Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 19

TABLE OF AUTHORITIES – Continued

Page

First Federal Savings & Loan Assn. of Hazelton v. State Treasurer, 650 A.2d 1166 (Pa.Cmwlth. 1994) 22

First Gibralter Bank, FSB v. Morales, 19 F.3d 1032 (5th Cir. 1994) 18

First Gibralter Bank, FSB v. Morales, 42 F.3d 895 (5th Cir. 1995) 18

Flanagan v. Germania, 872 F.2d 231 (8th Cir. 1989).....22

Grunbeck v. Dime Savings Bank, FSB, 74 F.3d 331 (1st Cir. 1996)..... 5

ITEL Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993)..... 9

Kenney v. Farmers National Bank of Opelika, 938 F.Supp. 789 (M.D.Ala. 1996).....23

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)..... 4

Livingston v. Vanguard Federal Savings Bank, 563 A.2d 175 (Pa.Super. 1989).....22

Mercer v. Theriot, 377 U.S. 152 (1964) 27

Morse v. Mutual Federal Savings & Loan Assn. of Whitman, 536 F.Supp. 1271 (D.C.Mass. 1982).....22

National Home Equity Mortgage Assn. v. Face, 239 F.3d 633 (4th Cir. 2001).....16, 17

O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994).....22

Peatros v. Bank of America, 22 Cal.4th 147 (2000).....23

Pena v. Downey Savings and Loan Assn., 929 F.Supp. 1308 (C.D.Cal. 1996).....22

People ex rel. Sepulveda v. Highland Federal Savings & Loan, 14 Cal.App.4th 1692 (1993) 21

TABLE OF AUTHORITIES – Continued

Page

People v. Abedi, 595 N.Y.S.2d 1011 (1993).....24

Sharpe v. FDIC, 126 F.3d 1147 (9th Cir. 1997) 23

Shinn v. Encore Mortgage Services, Inc., 96 F.Supp.2d 419 (D.N.J. 2000).....16, 17

Siegel v. American Savings & Loan Assn., 210 Cal.App.3d 953 (1989).....21

Skidmore v. Swift & Co., 323 U.S. 134 (1944).....27

Smith v. Beneficial Bank USA, 971 F.Supp. 513 (M.D.Ala. 1997).....23

Spitz v. Goldome Realty Credit Corporation, 569 N.E.2d 43 (Ill.App. 1991).....22

Tuxedo Beach Club Corp. v. City Federal Savings Bank, 749 F.Supp. 635 (D.N.J. 1990).....23

United States v. Stewart, 523 F.2d 1070 (9th Cir. 1975).....26

Washington Mutual Bank, FA v. Superior Court, 95 Cal.App.4th 606 (2002).....19

Zemel v. Rusk, 381 U.S. 1 (1965).....13

STATUTES AND REGULATIONS

12 C.F.R. § 545.32(b)(3) [Former].....10

12 C.F.R. § 545.33 [Former].....10, 11

12 C.F.R. § 545.33(a) [Former].....10

12 C.F.R. § 545.33(f) [Former].....10, 12, 18

12 C.F.R. § 560.2(b)(4).....19

12 C.F.R. § 560.2(c).....21

TABLE OF AUTHORITIES – Continued

Page

12 C.F.R. § 560.210 ..... 11, 12

12 C.F.R. § 560.220 ..... *passim*

12 C.F.R. § 560.33 11

12 C.F.R. § 560.34 ..... 11, 16

12 C.F.R. § 560.35 11

12 C.F.R. § 563.99 [Former] 10

12 U.S.C. § 24, Fifth 23

12 U.S.C. § 3801 11

12 U.S.C. § 3802 ..... 5, 7, 8, 28

12 U.S.C. § 3803 ..... 5, 6, 11

12 U.S.C. § 3803(a) 5

12 U.S.C. § 3803(a)(3) 6

12 U.S.C. § 3803(c) 5, 6, 8

12 U.S.C. §§ 1461, *et seq* 2

12 U.S.C. §§ 3801, *et seq* 2

California Business & Professions Code § 17200 21

California Business & Professions Code §§ 17200, *et seq.* 1, 17

California Civil Code §§ 1770, *et seq.* 17

California Welfare & Institutions Code §§ 15600, *et seq* 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

48 Fed.Reg. 23032 (April 23, 1983) 10

61 Fed.Reg. 50951 (Sept. 30, 1996) 10, 11, 12

65 Fed.Reg. 17811 (April 5, 2000).....13, 14

STATEMENT OF THE CASE

In an action for elder abuse under California Welfare & Institutions Code §§ 15600, *et seq.*, unlawful business practices under California Business & Professions Code §§ 17200, *et seq.*, and fraudulent concealment against a number of nonfederally-chartered lenders and their employees, plaintiffs Charles and Corinne Black, as trustees of their marital trust, alleged that defendants made false and misleading disclosures and representations with respect to defendants' reverse mortgage transactions. The trial court granted defendants' motion for summary judgment on the grounds of federal preemption.

Holding that plaintiffs' claims were not preempted, the California Court of Appeal, First Appellate District, Division Two, unanimously reversed. *Black v. Financial Freedom Senior Funding Corp.*, 92 Cal.App.4th 917 (2001). Charles Black died during the pendency of the appeal; Corinne Black is the surviving trustee of the Blacks' marital trust and appears here in that capacity.

The California Supreme Court unanimously denied defendants' subsequent petition for review.

All of the defendants except James Mahoney now seek review by certiorari of a single issue: "Whether the California Court of Appeal violated the Preemption Clause by allowing state law claims attacking an alternative mortgage transaction made in full compliance with the Parity Act by a state-chartered housing creditor?"

The issue is more aptly framed as follows: Does the Alternative Mortgage Transaction Parity Act preempt

state law claims for elder abuse, fraud, and unfair business practices?

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The California Court of Appeal's decision on the issue of federal preemption in this matter is fully supported by: (1) the intent of Congress as shown by the language of Alternative Mortgage Transaction Parity Act, 12 U.S.C. §§ 3801, *et seq.* (the "Parity Act") and its implementing regulations; (2) written interpretations of the subject regulations by the director of the Office of Thrift Services ("OTS"), the regulatory agency empowered to implement and administer the Parity Act; and (3) principles of federalism. There are no decisions of any court in conflict with the opinions expressed by the California Court of Appeal, and the decision of the California Court of Appeal adequately and correctly addressed each preemption issue before it.

Petitioners' secondary reliance on the Home Owners' Loan Act of 1933, 12 U.S.C. §§ 1461, *et seq.*, ("HOLA") is misplaced. Numerous published cases dealing with preemption issues arising under HOLA have uniformly held that state law fraud and unfair business practice claims similar to those of respondent's are not preempted.

As framed, the issue presented by the petitioners is not ripe for review. That issue is premised on the existence of a factual finding that the alternative mortgage transaction at issue was "made in full compliance with the Parity

Act," yet no such determination has ever been made by any court.

Petitioners fail to set forth a number of crucial matters contained in the record: (1) they present an argumentative factual recitation without disclosing that no factual determination of any kind has been made by the trial court and fail to accurately describe the allegations of respondent's complaint; (2) they fail to disclose that their own evidence raised a triable issue of material fact on whether they waived their preemption claims; (3) they complain that the trial court considered an interpretive letter from the OTS, yet do not disclose that they offered that very letter in support of their motion for summary judgment; (4) they do not reveal that they failed to offer any evidence to demonstrate that they have standing to raise the issue of preemption; and (5) they do not reveal the fact that their stance on the issue of preemption has been inconsistent.

Accordingly, the petition for certiorari should be denied.

II. THE CALIFORNIA COURT OF APPEAL PROPERLY CONSTRUED THE PARITY ACT AND ITS IMPLEMENTING REGULATIONS

A. The Scope of Preemption Under the Parity Act Is Limited

"Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L.Ed.2d 407, 112 S.Ct. 2608 (1992). The

"'historic police powers of the States'" extend to consumer protection in the area of unfair business practices. *California v. ARC America Corp.*, 490 U.S. 93, 101, 104 L.Ed.2d 86, 109 S.Ct. 1661 (1989).

Under the commerce clause, "both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38, 64 L.Ed.2d 702, 100 S.Ct. 2009 (1980).

In determining whether a state law conflicts with federal statutes or regulations, the federal-state conflict must be actual and unavoidable, not merely possible. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-337, 36 L.Ed.2d 280, 93 S.Ct. 1590 (1973).

After a thorough examination of the applicable law, the California Court of Appeal found that preemption of state-chartered lenders is extremely limited under the Parity Act, and held that "the Parity Act does not expressly, impliedly or through conflict preempt the Blacks' claims" of fraud, elder abuse, and unfair business practices. *Black,* 92 Cal.App.4th at 929-935.

As properly construed by the *Black* court, the Parity Act and its implementing regulations only preempt state laws in those areas which the OTS has deemed "appropriate" to federal regulation, leaving states free to regulate other aspects of alternative mortgage lending. *Black,* 92 Cal.App.4th at 927-932. Currently, only four areas have been identified by the OTS as "appropriate and applicable" to its exercise of regulatory authority: late charges, prepayments, adjustments to home loans, and disclosures for variable rate transactions. 12 C.F.R. § 560.220. All other regulations "are deemed inappropriate and inapplicable"

to the exercise of OTS' regulatory authority over alternative mortgage lending. 12 C.F.R. § 560.220.

B. Petitioners Ignore the Interplay Between 12 U.S.C. §§ 3803(a), 3803(c), and 3802

Petitioners point to 12 U.S.C. § 3803 as authority for their argument that all state regulation of nonfederally-chartered lenders is preempted. However, petitioners do not fully consider the interplay between 12 U.S.C. §§ 3803(a), 3803(c), and 3802.

Section 3803 merely gives authority to nonfederally-chartered lenders to make alternative mortgage loans and preempts states from denying those lenders the ability to make such loans. The Parity Act was enacted to prohibit state-by-state bans on alternative mortgages: "The Parity Act preempts State ***bans*** on certain 'alternative mortgage transactions,' by which is meant 'all manner of mortgage instruments that do not conform to the traditional fully-amortized, fixed-interest-rate mortgage loan.' [Citations and footnote omitted; emphasis added.]" *Grunbeck v. Dime Savings Bank, FSB*, 74 F.3d 331, 342 (1st Cir. 1996).

Petitioners' interpretation leads to the absurd conclusion that vast areas of the activities of state-chartered lenders cannot be regulated by the states even though the OTS has only chosen to regulate in the areas of late charges, prepayments, adjustments to home loans, and disclosures for variable rate transactions. *Black*, 92 Cal.App.4th at 929-930, 932.

Petitioners' argument contains a critical, unfounded, and unsupported assumption: state-chartered lenders are regulated in the same way as federally-chartered lenders,

and therefore federal laws and regulations apply in equal force to both. Petitioners cite no authority for such a sweeping presumption.

The Parity Act gave housing creditors the general authority to make, purchase, and enforce alternative mortgage transactions, including "reverse" or "equity sharing" mortgages. 12 U.S.C. § 3803. The specific authority allowing petitioners to make alternative mortgages is found in 12 U.S.C. § 3803(a)(3) which provides that the Parity Act only applies:

> "with respect to all other housing creditors, including without limitation, savings and loan associations, mutual savings banks, and savings banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section."

The preemption provision of the Parity Act is found in 12 U.S.C. § 3803(c) which provides: "An alternative mortgage may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation."

In *Black*, 92 Cal.App.4th at 930, the California Court of Appeal found this language to be susceptible to two interpretations when read in the context of other provisions of the Parity Act and its implementing regulations:

> "This language is susceptible to at least two interpretations. On one hand, the phrase 'state constitution, law, or regulation' is modified with the adjective 'any,' supporting the argument that the preemption provision precludes all state regulation of alternative mortgage transactions involving state-chartered creditors.
>
> "On the other hand, the phrase 'any state constitution, law, or regulation' can be interpreted as implicitly limited to those that prohibit or impede alternative transactions or that *conflict* with federal regulations deemed applicable to nonfederally-chartered housing creditors, i.e., the regulations that the transaction must be made 'in accordance with.' This interpretation would leave broad room for state regulation because there are only four federal regulations with which the transactions of housing creditors must comply. (See § 560.220.)"

The California Court of Appeal correctly identified the ambiguity and correctly reconciled it.

Under 12 U.S.C. § 3802:

> "A person is not a 'housing creditor' with respect to a specific alternative mortgage transaction if, except for this chapter, in order to enter into that transaction, the person would be required to comply with licensing requirements imposed under State law, unless such person is licensed under applicable state law and such person remains, or becomes, subject to the applicable regulatory requirements and enforcement mechanisms provided by State law."

Section 3802 would simply have no purpose if the Parity Act took all regulatory power away from the states.

In *Black*, 92 Cal.App.4th at 930, the California Court of Appeal observed:

> "Given the breadth accorded the states in regulating 'housing creditors' in 12 United States Code section 3802, the preemption language of 12 United States Code section 3803(c) can certainly be interpreted as not extending to state laws that concern aspects of those transactions other than those addressed by the four applicable federal regulations."

The *Black* court concluded with respect to preemption under the Parity Act, "the preemption language of the Parity Act does not contain a clear manifestation of congressional intent to preempt all state laws concerning the terms and marketing of alternative mortgage transactions. Absent such clear manifestation, the Parity Act does not expressly preempt claims such as those brought by the Blacks in this action." *Black*, 92 Cal.App.4th at 931.

This conclusion is in accord with established preemption jurisprudence. "As is always the case in our preemption jurisprudence, where 'federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."'" *California Div. Of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325, 136 L.Ed.2d 791, 117 S.Ct. 832 (1997).

The *Black* court correctly found that there was no implied preemption because the "regulations deemed applicable to nonfederally-chartered housing creditors are so limited in number as to be insufficient to occupy the

field (see [12 C.F.R.] § 560.220)." *Black*, 92 Cal.App.4th at 931. This is in accord with *ITEL Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 70-71, 122 L.Ed.2d 421, 113 S.Ct. 1095 (1993), where this Court held that the federal regulatory scheme at issue was not sufficiently pervasive to occupy the field.

The *Black* court also correctly found that there was no conflict preemption of respondent's claims. *Black*, 92 Cal.App.4th at 931-933. The *Black* court found that respondent's claims do not "stand as an obstacle" to Congress' purpose in enacting the Parity Act, and "do not seek to prohibit or impede the making of alternative mortgage transactions that comport with the applicable federal regulations; they simply require adequate disclosures." *Black*, 92 Cal.App.4th at 933. Finally, despite petitioners' unsubstantiated contention, the *Black* court found that respondent's claims "do not tread on areas of federal regulation applicable to nonfederally-chartered housing creditors, namely, late charges, prepayments and prepayment penalties, loan adjustments, and disclosures for variable rate transactions." *Ibid.* Under such circumstances, conflict preemption "simply does not apply." *Ibid.*

C. The History of the Parity Act and Its Implementing Regulations Support the Interpretation of the California Court of Appeal

1. Preemption in 1994 Under Former 12 C.F.R. § 545.33

The history of the Parity Act and its implementing regulations support the ruling of the California Court of Appeal. In 1994, the Parity Act's enabling and preemption

regulation was contained in former 12 C.F.R. § 545.33(f) which provided:

> "(f) *Notice of housing creditors regarding alternative mortgage transactions.* Pursuant to Title VIII, Pub. L. 97-320, housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions (as defined by section 803 of Pub. L. 97-320 and as further defined and described by applicable regulations identified herein) notwithstanding any state constitution, law or regulation. ***In accordance with section 807(b) of Pub. L. 97-320, the provisions listed below are identified as appropriate and applicable to the exercise of this authority, and all regulations not identified herein are deemed inappropriate and inapplicable***: Section 545.32(b)(3) [amortization] and (b)(4) [interest rate adjustments], § 545.33(a) [amortization] and (c) [interest rate adjustments], and § 563.99 [disclosure and notice]. Housing creditors engaged in credit sales should read the term 'loan' as 'credit sale' wherever appropriate. [Emphasis added.]" 48 Fed.Reg. 23032 (April 23, 1983).

2. The 1996 Adoption of 12 C.F.R. § 560.220

In 1996, the OTS reorganized its lending and investment regulations. 61 Fed.Reg. 50951 (Sept. 30, 1996). As part of that reorganization, the preemption provisions of former 12 C.F.R. § 545.33(f) were modified and moved to a new 12 C.F.R. § 560.220. 61 Fed.Reg. 50951, 50955. With the adoption of 12 C.F.R. § 560.220, section 545.33 was removed. 61 Fed.Reg. 50951, 50971.

The rule promulgated in 1996 reads as it does today:

"12 C.F.R. § 560.220 Alternative Mortgage Parity Act

> "Pursuant to 12 U.S.C. 3803, housing creditors that are not commercial banks, credit unions, or Federal savings associations may make alternative mortgage transactions as defined by that section and further defined and described by applicable regulations identified in this section, notwithstanding any state constitution, law, or regulation. In accordance with section 807(b) of Public Law 97–320, 12 U.S.C. 3801 note, §§ 560.33 ["Late Charges"], 560.34 ["Prepayments"], 560.35 ["Adjustments to Home Loans"], and 560.210 ["Disclosures for Variable Rate Transactions"] of this part are identified as appropriate and applicable to the exercise of this authority and all regulations not so identified are deemed inappropriate and inapplicable. Housing creditors engaged in credit sales should read the term 'loan' as 'credit sale' wherever applicable." 61 Fed.Reg. 50951, 50983.

The amendment and renumbering of the regulation is significant because OTS had originally proposed "moving paragraph (f) [of 12 C.F.R. § 545.33] in order to make it more accessible and easier to locate ***and to clarify that all OTS lending regulations apply to loans originated under the Parity Act.*** [Emphasis added.]" 61 Fed.Reg. 50951, 50955. However, that proposed extension of the Parity Act's regulations was not adopted.

Instead, in the "Section by Section Analysis" commentary by the OTS, the agency specifically stated that it had chosen not to regulate all activities of state licensed lenders in alternative mortgage transactions:

"Section 560.220 Alternative Mortgage Parity Act

"This section (originally proposed as § 560.210) is derived from current § 545.33(f), 'Notice of housing creditors regarding alternative mortgage transactions' and applies to state savings associations and certain other state-chartered lenders. OTS has observed that state housing creditors interested in engaging in alternative mortgage transactions could not easily locate § 545.33(f). Placing these provisions into a subpart specifically dealing with alternative mortgages will make them more accessible. The section has been streamlined and modified to remove cross-references to repealed provisions and to clarify the scope of federal lending regulations applicable to state housing creditors electing to originate loans under the Parity Act. ***While the proposal indicated that all of new Part 560 would be considered appropriate and applicable to the exercise of the authority under the Parity Act, the final rule has been revised to identify the appropriate sections with greater specificity.*** [Emphasis added.]" 61 Fed.Reg. 50951, 50969.

This commentary clearly shows that the OTS did not intend to regulate the entire field of alternative mortgage lending by nonfederally-chartered lenders. Instead, it only chose to identify its regulations relating to late charges, prepayments, adjustments to home loans, and disclosures for variable rate transactions as "appropriate and applicable" to the exercise of its regulatory authority over reverse mortgage transactions. The present OTS regulation specifically states that all other regulations "are deemed inappropriate and inapplicable" to the exercise of its

regulatory authority over reverse mortgage transactions. 12 C.F.R. § 560.220.

Since 12 C.F.R. § 560.220 was implemented in 1996, Congress has not acted to repudiate the OTS' determination that only limited federal regulation – and thereby only limited preemption of state regulation – of alternative mortgage lending was "appropriate and applicable" to its exercise of authority under the Parity Act. This is persuasive evidence that the OTS' interpretation of the scope of its authority under the Parity Act is the one intended by Congress. *Zemel v. Rusk*, 381 U.S. 1, 11, 14 L.Ed.2d 179, 85 S.Ct. 1271 (1965).

3. Public Statements by the Director of the OTS and One of the Authors of the Parity Act Support a Construction of Limited Scope of Preemption

The limited nature of the Parity Act's preemptive scope has also been acknowledged in the more recent statements of Ellen Seidman, Director of the OTS. On April 5, 2000, the OTS issued an advanced notice of a proposed rulemaking ("ANPR") in the Federal Register entitled "Responsible Alternative Mortgage Lending." *See* 65 Fed.Reg. 17811 (April 5, 2000). In the ANPR, the Director sought public comment on potential federal regulations to control predatory lending practices in the alternative mortgage industry. In addition, the Director reviewed the background of OTS' lending regulations under the Parity Act and state initiatives to address predatory lending. 65 Fed.Reg. 17811, 17812-17815.

In addressing whether the OTS should modify its regulations implementing the Parity Act, the Director

acknowledged the continuing vitality of state regulation in areas not specifically covered by the Parity Act:

> "The Parity Act, as discussed above, authorizes housing creditors to make alternative mortgage loans as long as the transactions are 'in accordance with' appropriate and applicable OTS regulations. The Act does not grant housing creditors the same powers as federal savings associations outside of the context of alternative mortgage transactions. ***Even within that context, state law governs those aspects of a housing creditor's operations not covered by regulations designated as applicable to alternative mortgage transactions under the Parity Act. The limited role the Parity Act plays in the overall regulation of housing creditors has not always been clearly understood.*** [Emphasis added.]" 65 Fed.Reg. 17811, 17815-17816; *see Black*, 92 Cal.App.4th at 933-934.

In her May 24, 2000, testimony before the House Committee on Banking and Financial Services on "Predatory Lending Practices," Director Seidman commented directly on the issue now before this Court:

> "[L]et me say that even when we have the Parity Act at work, many, many, many things are not preempted. HOEPA is not preempted; Fair Lending is not preempted; State civil and criminal fraud penalties are not preempted. What we are talking about here are a limited number of loan terms and that is why we have the ANPR out to ask whether we should make some changes." (Transcript of Hearing, 5/24/00, p. 53.)

Director Seidman's interpretation is further buttressed by comments of Representative John LaFalce (D-N.Y.) at the same May 24, 2000, hearing on "Predatory Lending Practices." Representative LaFalce, one of the two members of the House Committee on Banking and Financial Services who had co-sponsored the Parity Act, discussed the appropriate standard of construction which he felt should be used to determine whether Congress intended to preempt State consumer protection laws:

> "Let me first address the always-present tension between Federal law and State law, Federal regulation and State regulation. I think, as a general rule, we must understand that Federal law can preempt actions of the State, but that very, very frequently, it is not the intent of Federal law to preempt, especially when consumer protections are concerned and the State is advancing greater consumer protections than might exist under Federal law.
>
> "Further, in order for the Federal law to preempt, usually we must speak explicitly to the issue of preemption. In the absence of explicit language, in dealing with a State consumer protection, it is my judgment that deference should be given to the State consumer protection, as a matter of general construction. We will have more dialogue about that in the future. That is not always the case, but it seems to me that should be a general rule of construction.
>
> "To go to the specific issue of predatory lending, we have some individuals who say there is ample regulatory authority to deal with the problems of predatory lending if only the regulators would use it. We have some who say it is imperative that we have new legislation. I suspect that both

are correct. . . . " (Transcript of Hearing, 5/24/00, p. 57.)

Thus, one of the co-sponsors of the Parity Act has stated that: (1) federal laws should be construed as deferring to state consumer protection in the absence of explicit Congressional language; and (2) states have authority to deal with predatory lending practices such as alleged in respondent's complaint.

Despite petitioners' desire to make it appear otherwise, the California Court of Appeal's opinion in *Black* correctly delineates the limited scope of federal preemption under the Parity Act.

II. THE OPINION OF THE CALIFORNIA COURT OF APPEAL DOES NOT CONFLICT WITH THE OPINION OF ANY OTHER COURT

A. The Parity Act Cases Cited by Petitioners Do Not Conflict with the *Black* Decision

Although petitioners contend otherwise, the opinion in *Black* is not in conflict with decisions of any other court. Respondent does not dispute that the Parity Act preempts state regulation of prepayment penalties or fees under 12 C.F.R. § 560.34. *National Home Equity Mortgage Assn. v. Face*, 239 F.3d 633 (4th Cir. 2001) ("*Face*"); *Shinn v. Encore Mortgage Services, Inc.*, 96 F.Supp.2d 419 (D.N.J. 2000) ("*Shinn*"). However, neither *Face* nor *Shinn* addressed the issue of the Parity Act's preemption of state laws dealing with unfair business practices, fraud, or elder abuse, or indeed the preemption of any state law other than those which attempt to regulate prepayment of penalties or fees.

As the *Black* court explained at length, neither *Face* nor *Shinn* supports petitioners' preemption argument. *Black,* 92 Cal.App.4th at 934-936. The *Black* court properly found that *Face* does not provide "much assistance" in resolving this case because it concerns preemption of state laws limiting prepayment fees, "a subject addressed in a federal regulation specifically identified in [12 C.F.R. §] 560.220 as applicable to nonfederally-chartered housing creditors." *Black,* 92 Cal.App.4th at 934. The *Black* court also properly found "*Shinn* . . . similarly uninstructive because it also considers whether the Parity Act preempts a state law prohibiting prepayment fees. [Citation.]" *Black,* 92 Cal.App.4th at 935.

The court in *Ansley v. Ameriquest Mortgage Co.*, 194 F.Supp.2d 1062 (C.D.Cal. 2002), recently recognized the limited scope of the decisions in *Face* and *Shinn*. In *Ansley*, a mortgagor brought a state court action against his mortgagee claiming that the mortgage's prepayment penalty assessment provisions violated California's Consumer Legal Remedies Act, Civil Code §§ 1770, *et seq.*, and unfair business practices laws, California Business & Professions Code §§ 17200, *et seq*. The defendant mortgagee removed the action to federal court and the plaintiff moved for remand to state court and for award of attorney fees. In its order remanding the case, the *Ansley* court held that the plaintiff's claim was not completely preempted by the Parity Act, and awarded plaintiff attorney fees because the "defendant did not, and presumably cannot, provide any authority in support of its argument that the Parity Act completely preempts California law so as to justify removal." *Ansley*, 194 F.Supp.2d at 1065.

The *Ansley* court found, as did the court in *Black*, that the decisions in *Face*, 239 F.3d 633, and *Shinn*, 96

F.Supp.2d 419, were distinguishable: "While these cases dealt with whether the Parity Act preempted state law, neither case held that the Parity Act completely preempted state law so as to confer exclusive federal jurisdiction. [Citations.]" *Ansley*, 194 F.Supp.2d at 1065.

Petitioners made no attempt to remove this matter to federal court, and have thereby implicitly conceded that the Parity Act does not completely preempt respondent's claims.[1]

Petitioners ask this Court to consider the reasoning of a third case, *First Gibralter Bank, FSB v. Morales*, 19 F.3d 1032 (5th Cir. 1994), a decision that was vacated a year after it was published. *See First Gibralter Bank, FSB v. Morales*, 42 F.3d 895 (5th Cir. 1995). In its 1994 decision, the Fifth Circuit considered whether *former* 12 C.F.R. § 545.33(f) preempted Texas' homestead law to the extent that the homestead law acted to prohibit federally regulated housing creditors from offering reverse mortgage loans. *First Gibralter,* 19 F.3d at 1052-1053. The vacated 1994 *First Gibralter* opinion deals with a repealed regulation in a case involving a Texas law that had the effect of preventing Federal associations from offering reverse annuity mortgages to certain borrowers. The reasoning in *First Gibralter* is not instructive with regard to this matter as the issues here do not include an outright ban on reverse mortgages, the powers of federally-chartered associations, or the scope of Texas law.

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[1] As more fully discussed, *infra*, petitioners' initial position as argued in their motion for summary judgment was that respondent's claims were completely preempted.

B. The Other Cases Cited by Petitioners Do Not Conflict with the *Black* Decision

Petitioners also cite several other cases which they contend support their position. Petitioners are incorrect.

In *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159, fn. 14, 73 L.Ed.2d 664, 102 S.Ct. 3013 (1982), this Court specifically declined to hold that federal regulations preempt *all* state laws in the "entire field of federal savings and loan regulation."

In *Washington Mutual Bank, FA v. Superior Court*, 95 Cal.App.4th 606, 621 (2002), the court held that plaintiffs' claims that defendant improperly charged preclosing interest on loan proceeds once those proceeds were made available to the borrower through escrow by wire or electronic transfer were preempted by HOLA. Contrary to the inference petitioners seek to draw from that holding, the *Washington Mutual* court recognized that HOLA "does not 'preempt the application of all state and local laws' pertaining to federal savings and loans." *Washington Mutual*, 95 Cal.App.4th at 620. Instead, the *Washington Mutual* court narrowly held that plaintiffs' claims relating to "the amount of interest charged over the life of the loan, and the timing of the disbursal of loan proceeds" were preempted by the effect of 12 C.F.R. § 560.2(b)(4), one of the specific "illustrative examples" of the types of state laws identified by the OTS as preempted by HOLA. *Washington Mutual*, 95 Cal.App.4th at 621.

In *Federal Savings & Loan Ins. Corp. v. Kidwell*, 716 F.Supp. 1315, 1317 (N.D.Cal. 1989), *vacated on other grounds sub nom. Eureka Federal Savings and Loan Ass'n v. Kidwell*, 937 F.2d 612 (9th Cir. 1991), FSLIC and Eureka Federal Savings brought state law claims for negligence

and waste against Eureka's former officers, directors and employees alleging gross violations of prudent lending practices committed during their tenure. The district court held that the state law claims were preempted because they addressed the "subject of operations" of the federally chartered savings and loan. *Kidwell*, 716 F.Supp. at 1316-1317.

Here, the claims of unfair business practices, elder abuse, and fraud do not address petitioner's operations. In *Fenning v. Glenfed, Inc.*, 40 Cal.App.4th 1285, 1298-1299 (1995), *rev. den.*, the California Court of Appeal held that HOLA did not preempt state law claims against a federal savings and loan for unfair business practices:

> "[A]ctions for fraud are governed almost exclusively by state law, and do not raise issues of great federal interest. There is no reason to suppose that Congress intended to preempt common law tort claims, effectively granting savings associations immunity from such state law claims and a number of courts have so held. . . . And the Bank's argument that, by permitting fraud and unfair trade practices suits, the state is regulating the Bank's conduct, is off the mark. Plaintiff's ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations. Put another way, the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however, the Bank chooses to operate, it do so free from fraud and other deceptive business practices. [Citations and footnote omitted.]"

Thus, none of the cases discussing the preemptive effect of federal banking laws on which petitioners rely support their preemption argument.

III. THE DECISION OF THE *BLACK* COURT IS CONSISTENT WITH OTHER DECISIONS ON THE SCOPE OF PREEMPTION OF STATE LAW BY FEDERAL BANKING LAW

Petitioners argue that state-chartered alternative mortgage lenders must be treated as if they were federally chartered lenders regulated by HOLA for purposes of preemption analysis. Assuming, *arguendo*, that to be true, courts have consistently found that HOLA does not preempt state law claims for unfair business practices, fraud, or breach of contract. *See* 12 C.F.R. § 560.2(c).

Thus, other California courts dealing with issues of the scope of federal banking law preemption have reached conclusions which are consistent with the decision in the instant case. In *People ex rel. Sepulveda v. Highland Federal Savings & Loan*, 14 Cal.App.4th 1692, 1708 (1993), *reh. den., cert. den.*, 510 U.S. 928, the court held that HOLA did not preempt a claim for violation of California Business & Professions Code § 17200. In *Siegel v. American Savings & Loan Assn.*, 210 Cal.App.3d 953 (1989), the court held that HOLA did not preempt the plaintiffs' claims for, *inter alia*, civil conspiracy, unfair competition, and fraud.

Similarly, a significant number of federal courts and other state courts have held that federal banking laws do not preempt state law claims arising out of unfair business practices, tort, and breach of contract. *See, e.g.*: *Federal Deposit Insurance Corporation v. Stahl*, 89 F.3d 1510 (11th Cir. 1996) [HOLA does not preempt claim by FDIC against

directors of failed savings and loan for negligence]; *Flanagan v. Germania*, 872 F.2d 231, 234 (8th Cir. 1989) [HOLA does not preempt state claim for tortious interference with contract]; *Pena v. Downey Savings and Loan Assn.*, 929 F.Supp. 1308 (C.D.Cal. 1996) [HOLA does not preempt an employee's action for civil rights violations and defamation against a savings and loan]; *Morse v. Mutual Federal Savings & Loan Assn. of Whitman*, 536 F.Supp. 1271, 1280-1281 (D.C.Mass. 1982) [HOLA does not preempt award of attorneys fees and punitive damages in an unfair trade practice action against a federal savings and loan]; and *First Federal Savings & Loan Assn. of Hazelton v. State Treasurer*, 650 A.2d 1166, 1168-1169 (Pa.Cmwlth. 1994) [HOLA does not preempt state contract claim].

Cases in which federal or other state courts have held that HOLA does not preempt complimentary state regulations include: *Livingston v. Vanguard Federal Savings Bank*, 563 A.2d 175, 178-180 (Pa.Super. 1989) [HOLA does not preempt Pennsylvania ban on imposition of prepayment penalties on mobile home installment sales contracts]; and *Spitz v. Goldome Realty Credit Corporation*, 569 N.E.2d 43 (Ill.App. 1991) [HOLA did not preempt an action under the Illinois Mortgage Escrow Account Act against a state servicing subsidiary of a federal savings association].

A number of other cases support the finding that respondent's claims are not preempted even though the cases deal with federal banking laws other than the Parity Act and HOLA.

In *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 129 L.Ed.2d 67, 114 S.Ct. 2048 (1994), this Court held that California law was not preempted by FIRREA in an action

for professional malpractice and breach of fiduciary duty by the FDIC against former attorneys for a failed savings and loan.

In *Beffa v. Bank of the West*, 152 F.3d 1174, 1177 (9th Cir. 1998), the Ninth Circuit held that the Expedited Funds Availability Act does not preempt state negligence or misrepresentation causes of action. In *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), the Ninth Circuit held that state law claims for breach of contract, rescission, and declaratory relief against the FDIC were not preempted by FIRREA.

In *Peatros v. Bank of America*, 22 Cal.4th 147 (2000), the California Supreme Court held that a section of the National Bank Act, 12 U.S.C. § 24, Fifth, did not preempt a bank manager's claims for discrimination and wrongful termination.

In *Briggs v. Countrywide Funding Corp.*, 949 F.Supp. 812, 814 (M.D.Ala. 1996), the district court held that RESPA does not preempt state disclosure laws which require additional disclosures to borrowers. In *Kenney v. Farmers National Bank of Opelika*, 938 F.Supp. 789 (M.D.Ala. 1996), the district court held that the National Bank Act does not "completely preempt" state claims challenging insurance premiums charged by national bank. In *Smith v. Beneficial Bank USA*, 971 F.Supp. 513 (M.D.Ala. 1997), the district court held that an action for fraud was not "completely preempted" by the National Bank Act. In *Tuxedo Beach Club Corp. v. City Federal Savings Bank*, 749 F.Supp. 635, 648-649 (D.N.J. 1990), the district court held that a cause of action for fraud under the New Jersey Consumer Fraud Act ("CFA") was not preempted by

FIRREA or "any other federal statute which would conflict with a private right of action under CFA."

In *People v. Abedi*, 595 N.Y.S.2d 1011, 1015-1016 (1993), the New York court held that New York State's criminal prosecution of bank officers and directors for fraud, conspiracy, and falsification of business records was not preempted by the Federal Bank Holding Company Act and was supported by a "Statement of Interest" submitted in the action by the Federal Reserve Board welcoming New York's "vigorous prosecution."

The uniformity of these decisions adds substantial support to the decision of the *Black* court.

IV. PETITIONERS FAIL TO STATE A NUMBER OF SIGNIFICANT FACTS AND MISSTATE THE RECORD IN SEVERAL AREAS

A. Petitioners' Recitation of the Facts Is Argumentative and Fails to Adequately Describe the Allegations of Respondent's Complaint

Petitioners' recitation of the "facts" of the underlying transaction is not supported by the record. Petitioners' "factual" recitation should be recognized for the plain argument that it is because, as yet, there has been no determination of any factual issues by the trial court.

Indeed, on appeal, petitioners sought affirmance of the trial court's order granting summary judgment on the ground that there was no factual basis for any of the Blacks' claims. The California Court of Appeal expressly rejected that request without prejudice, holding that petitioners' "arguments concerning the Blacks' claims were not presented to any material extent at all in [their]

motion for summary judgment. . . . " *Black*, 92 Cal.App.4th at 925, fn. 9.

Petitioners fail to completely describe the factual basis for the claims set forth in respondent's complaint which alleges, *inter alia*, that: (i) the transaction at issue was a fraudulently disguised sale of seventy percent (70%) of the equity in her home in return for payment of less than thirty percent (30%) of its value; (ii) petitioners made written misrepresentations that there would be "no prepayment charges" yet the transaction – if viewed as a loan – requires prepayment of some twenty-four (24) years worth of interest; and (iii) petitioners fraudulently inflated the Blacks' life expectancies by some twenty percent (20%) in calculating the amounts payable under the annuity purchased by the Blacks and the amounts due under the "reverse mortgage," thereby decreasing the Blacks' annuity payments and increasing their debt.

Petitioners offered no evidence in their motion for summary judgment to refute any of those allegations, nor did they identify any federal law which would allow such conduct. As previously discussed, petitioners' failure of proof was a significant reason the California Court of Appeal reversed the trial court's order granting summary judgment. *Black*, 92 Cal.App.4th at 925, fn. 9.

B. Petitioners' Own Evidence Raised a Triable Issue of Fact on the Issue of Preemption

One of the exhibits submitted by petitioners to the trial court itself raised a dispute of material fact as to whether federal preemption applies at all to the particular transaction at issue. The "Deed of Trust" attached as

Exhibit F to petitioners' motion contains the following provision on p. 13:

> "7.14 *Governing Law; Severability; Headings.* ***The Loan Documents shall be governed by, and construed in accordance with the laws of the State of California.***" (2 JA 383; emphasis added.)[2]

Even assuming that federal law preempted respondent's claims, petitioners' own evidence establishes that petitioners elected to enter into a transaction governed by California law. *See United States v. Stewart*, 523 F.2d 1070, 1072 (9th Cir. 1975). Thus, petitioners' own evidence raises a triable issue of material fact as to the issue of whether petitioners waived federal preemption. Therefore, this case will turn upon its own facts and will affect few persons other than the litigants.

C. Petitioners Offered the Interpretive Letter from the Office of Thrift Services That They Now Claim the Court of Appeal Erred in Considering

Petitioners argue that the California Court of Appeal erred in relying on a February 10, 1997, interpretive letter from the OTS, and claim that the letter is "entitled to little deference." In that letter, the Chief Counsel of the OTS informs the inquiring state-licensed alternative mortgage lender: (1) it may make alternative mortgage loans; (2) it

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[2] As used in this opposition, "# JA #" refers to the volume and page of the Joint Appendix submitted by the parties to the California Court of Appeal in lieu of a Clerk's Transcript pursuant to California Rules of Court, rule 5.1.

must comply with OTS regulations relating to late charges, prepayments, adjustments to home loans, and disclosures for ARM's; and (3) "[***a***]***s long as the Company complies with the requirements of these OTS regulations in making and enforcing its ARM loans, the Company need not comply with conflicting or inconsistent state restrictions***. [Emphasis added.]" (5 JA 913.)

Petitioners fail to inform this Court that they originally offered the 1997 interpretive letter to the trial court in support of their motion for summary judgment. Petitioners also fail to inform this Court that they cited that same letter in their brief to the California Court of Appeal: "The Office of Thrift Supervision ('OTS') – ***whose words have the force of Congressional enactments as to mortgage lending regulation*** – has repeatedly recognized that the Parity Act 'preempts state laws that prohibit or impede alternative mortgage transactions. [Emphasis added.]' OTS Letter P-97-1, February 10, 1997 at 2; and OTS Letter P-96-13, November 27, 1996 at 2. 4 JA 911-912, 918-919." *Respondents' Brief,* 1/16/2001, p. 24.

To the extent that consideration of the opinion letter was error, it was invited by petitioners. *Mercer v. Theriot*, 377 U.S. 152, 154, 12 L.Ed.2d 206, 84 S.Ct. 1157 (1964).

Consideration of the letter was not error. It was thorough, properly reasoned, and consistent with other OTS pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L.Ed. 124, 65 S.Ct. 161 (1944).

D. Petitioners Failed to Offer any Evidence to Support Their Standing to Claim Preemption

Petitioners introduced no evidence in support of their motion for summary judgment to show that any of the petitioners is or was licensed by the State of California. Thus, assuming *arguendo* that the Parity Act preempts a part or all of respondent's claims, petitioners failed to show that they had standing to claim protection under the Parity Act.

In order to claim any protection under the Parity Act, a lender must qualify as a "housing creditor." Under 12 U.S.C. § 3802:

> "A person is not a 'housing creditor' with respect to a specific alternative mortgage transaction if, except for this chapter, in order to enter into that transaction, the person would be required to comply with licensing requirements imposed under State law, ***unless such person is licensed under applicable state law and such person remains, or becomes, subject to the applicable regulatory requirements and enforcement mechanisms provided by State law***. [Emphasis added.]"

Petitioners failed to introduce evidence to show that any of the petitioners were licensed under state law and remain subject to state law, and therefore fell within the Parity Act's definition of "housing creditor." It is clear why petitioners did not do so. As the *Black* court observed, the very definition of "housing creditor" as one who is subject to "applicable regulatory and enforcement mechanisms" of state law provides authority for the conclusion that the Parity Act does not preempt all state laws relating to

alternative mortgage transactions. *Black*, 92 Cal.App.4th at 930.

E. Petitioners' Stance on the Scope of Preemption Has Been Inconsistent

Petitioners' stance on the scope of preemption has been inconsistent. On January 21, 2000, petitioners argued to the trial court that "comprehensive provisions of federal law operate together to grant ***complete federal control and preemption*** over the making and administration of [the Blacks'] loan. [Emphasis added.]" (2 JA 261.) Respondent submitted authorities which refuted that contention. (5 JA 1087-1088.) Then, on May 30, 2000, petitioners argued to the trial court that federal banking laws did not "completely preempt" state banking laws, claiming they had never taken such a position. (6 JA 1310-1312.)

Petitioners now seem to have returned to their original, and still erroneous stance.

V. CONCLUSION

For all of the foregoing reasons, respondent Corinne Black, Surviving Trustee of the Charles T. Black and Corinne E. Black Trust Agreement dated April 20, 1982,

respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-1591

IN THE

Supreme Court of the United States

ULLICO INC., MRCO, INC., THE UNION LABOR LIFE INSURANCE COMPANY, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, and BEVERLY MIRTLE, LIFE INSURANCE COMPANY, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, and BEVERLY MIRTLE,

Petitioners,

v.

CORINNE E. BLACK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

REPLY BRIEF

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8 pages

STATEMENT PURSUANT TO RULE 29.6

Petitioners Rule 29.6 Statement was set forth at page *iii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

1. Respondent asserts that Petitioners' own evidence raised a triable issue of fact on the issue of preemption, pointing to a choice of law provision in the applicable deed of trust by which California law is purported to govern the loan documents and their construction. Opp. 25-26. Neither the trial court nor the Court of Appeal made any such finding, and plaintiff did not assert it below. In California summary judgment practice, issues not raised in the trial court may not be asserted for the first time on appeal. *Webster v. Southern Cal. First Nat. Bank*, 68 Cal. App. 3d 407, 416-417 (1977); *North Coast Business Park v. Nieldsen Construction Co.*, 17 Cal. App. 4th 22, 29 (1993).

In any case, it is the Note, and not the Deed of Trust, that contains the provisions concerning which Respondent complains in this action. Respondent's Complaint does not seek any relief from the lien of the Deed of Trust nor any reallocation of the rights and liabilities it creates. 1 JA 2, 30-31[1].

The Note directly addresses the choice of law issue in pertinent part as follows: "This Note shall be governed by the laws of the State of California except to the extent of any overriding federal law or conflicting federal law that preempts state law." 2 JA 361, 367.

The Freedom Plan Loan Application and Commitment, which Respondent signed, similarly provides that "This Application/Commitment and all other Loan Documents shall be governed by the laws of the State of California except as such laws may be preempted by Federal law (such as Garn-St. Germain Act)." 2 JA 448, 457. The parenthetical reference at the end of this quotation is particularly apt because the Parity Act is itself part of the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982).

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1. "__ JA __" refers to the volume and page of the Joint Appendix submitted by the parties to the California Court of Appeal in lieu of a Clerk's Transcript pursuant to California Rules of Court, Rule 5.1.

Thus, there can be little question that the parties recognized the supremacy of federal law in this transaction. Giving full credit to the language of the Deed of Trust, all that Respondent can assert is that the Note, which acknowledges the supremacy of federal law, must, according to the Deed of Trust, be construed under California law. Respondent does not suggest that California law would not give effect to a provision which thus recognized the supremacy of federal law. By statute, California has codified the common law preference for interpretations which would give effect to — as opposed to those which would make void — such provisions. Cal. Civ. Code § 3541.

The decision in *United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975), on which Respondent relies, is not to the contrary. *Stewart* involved an individually negotiated loan transaction in which the parties struck from both the note and deed of trust a provision adopting the Veterans' Benefits title of the United States Code, leaving only a provision adopting California law. The Ninth Circuit applied California law to restrict the lender's foreclosure rights. However, the Ninth Circuit later acknowledged that the individual negotiation of the *Stewart* agreement "is not critical to our determination" of whether state law may have a role in the regulation of federal benefit programs. *Whitehead v. Derwinski*, 904 F.2d 1362,1372 n.8 (9th Cir. 1990). Instead, the Ninth Circuit applies the tests of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979): "(1) whether the issue requires 'a nationally uniform body of law'; (2) 'whether application of state law would frustrate specific objectives of the federal programs'; and (3) whether 'application of the federal rule would disrupt commercial relationships predicated on state law.' " (*Kimbell Foods*, 440 U.S. at 728-29).

However, *Kimbell Foods* applies only "when Congress has not spoken." *Id.* at 727. In the Parity Act, Congress acted to "eliminate the discriminatory impact" of imposing fifty sets of laws on state-chartered housing creditors while federally-chartered lenders were required to comply with only one so

that "those [housing] creditors will have parity with federally chartered institutions." S. CONF. REP. NO. 97-641, at 94 (1982). Congress then exempted qualifying alternative mortgage transactions from "any State constitution, law or regulation." 12 U.S.C. § 3803(c). Since Congress has acted to create a rule of decision for alternative mortgage transactions, *Kimbell Foods* and its progeny do not apply to undermine the determination of Congress.

Finally, it must be noted that Respondent offers no authority for the proposition that private contracting parties may elect by contract to be governed by state law to the exclusion of federal law or to relinquish the benefits and protections conferred by federal law. In the analogous area of ERISA preemption, most federal courts have refused to allow a choice of law provision to trump the intentions of Congress in mandating uniform federal regulation. *Prudential Ins. Co. of Am. v. Doe*, 140 F.3d 785, 790-91 (8th Cir. 1998) ("The choice of law provision in the [benefits plan] does not alter the outcome here, for parties may not contract to choose state law as the governing law of an ERISA-governed benefit plan"); *Morton v. Smith*, 91 F.3d 867, 871 (7th Cir. 1996) (choice-of-law provision does not control because the "federal common law of ERISA preempts most state law in regulating the interpretation of benefit plans"); *In re Sears Retiree Group Life Ins. Litig.*, 90 F. Supp.2d 940, 950-51 (N.D.Ill. 2000) ("A choice of law provision does not operate to waive the applicability of federal law regarding interpretation of an ERISA plan.").

To permit parties to choose state over federal law in the mortgage field would undermine the carefully-crafted regulatory scheme created by Congress to govern mortgage lending, excusing, for example, compliance with the Real Estate Settlement Practices Act, the Truth in Lending Act, the Truth in Lending Simplification and Reform Act, the Equal Credit Opportunity Act, Regulation Z and Appendix K and many other statutes adopted for the benefit of both borrowers and lenders.

2. Respondent further asserts that Petitioners failed to offer any evidence to support their standing to claim preemption, asserting that none of them is or was licensed by the State of California. Opp. 28-29. However, Respondent fails to note that she relies on claims of agency, conspiracy and *alter ego* to hold Petitioners responsible for a loan made by another entity, Freedom Investment Fund, Inc. 1 JA 2, 5, 18, 20. Freedom Investment Fund was proven to be licensed by the State of California and to be regularly engaged in the business of making loans, credit sales or advances secured by interests in residential real property. 2 JA 278, 284, 400. Respondent further overlooks the allegation of her own Complaint that Petitioner ULLICO Inc. is the transferee of the reverse mortgage interests of Petitioner Financial Freedom Senior Funding Corporation (1 JA 2, 19), another licensee which was proven to be engaged in the mortgage lending business. 2 JA 284.

The Parity Act expressly extends its protections to transferees of the designated housing creditors. The term "housing creditor" includes "any person who regularly makes loans, credit sales or advances secured by interests in [residential real property and dwellings] or . . . any transferee of any of them." 12 U.S.C. §§ 3802(2)(C) and (D). Therefore, respondents are "housing creditors" as defined by the Parity Act, because they regularly made loans secured by interests in residential real property or were transferees, *alter egos,* or agents, of such lenders or transferees. Respondent cannot be heard to claim that Respondents are *alter egos* of housing creditors to the extent that their "individuality and separateness has ceased," according to her Complaint (1 JA 2, 20), and at the same time claim that the Respondents are not entitled to the protections pertinent to housing creditors under federal law.

3. Respondent asserts that her claims do not stand as an impediment to the making of alternative mortgage transactions that comport with the applicable federal regulations, but that, quoting the Court of Appeal, "they simply require adequate disclosures." Opp. 9. This assertion is at odds with Respondent's

own description of her claims which go beyond seeking disclosure of the terms of the transaction to dispute the substance and terms of the transaction itself. Opp. 25.

Disclosures, however, are an integral part of the lending process, as the Office of Thrift Supervision has shown by its adoption of 12 C.F.R. § 560.2. Section 560.2(b)(9) expressly preempts state regulation of loan disclosures by federal savings banks.

The disclosures for this loan were proven to include an example of the projected maturity value of the associated certificate of deposit, a Truth in Lending Disclosure under the federal Truth in Lending Act, a Notice of Right to Cancel pursuant to the federal Truth in Lending Simplification and Reform Act of 1980, and a five page proprietary disclosure covering the Freedom Plan, the loan documents, and the risks of the transaction. In addition, Respondent received a Fair Lending Notice under California law, a Mortgage Servicing Disclosure pursuant to the Real Estate Settlement Procedures Act ("RESPA"), a Good Faith Estimate of Settlement Costs also pursuant to RESPA, a Controlled Business Arrangement Disclosure Statement, an Advisor Disclosure, and a detailed Loan Application and Commitment. Indeed, the only disclosures which Respondent claims not to have received are ones of her own devising which have never been authorized or required by any legislative or regulatory body. Given the panoply of disclosures expressly required by federal law, Congress can hardly have contemplated the adoption of new ones by fifty sets of state courts and legislatures and a myriad of individual litigants.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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